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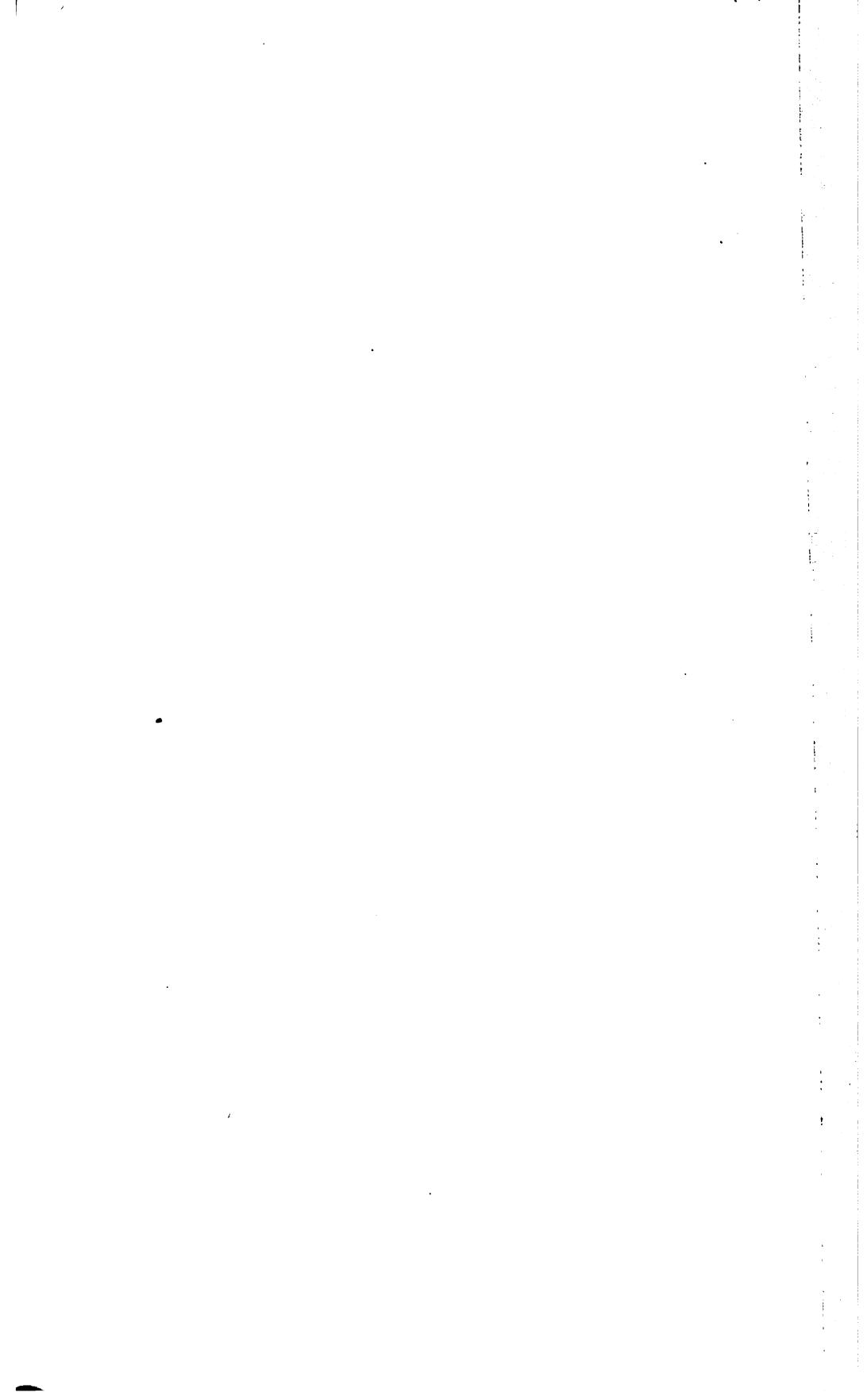


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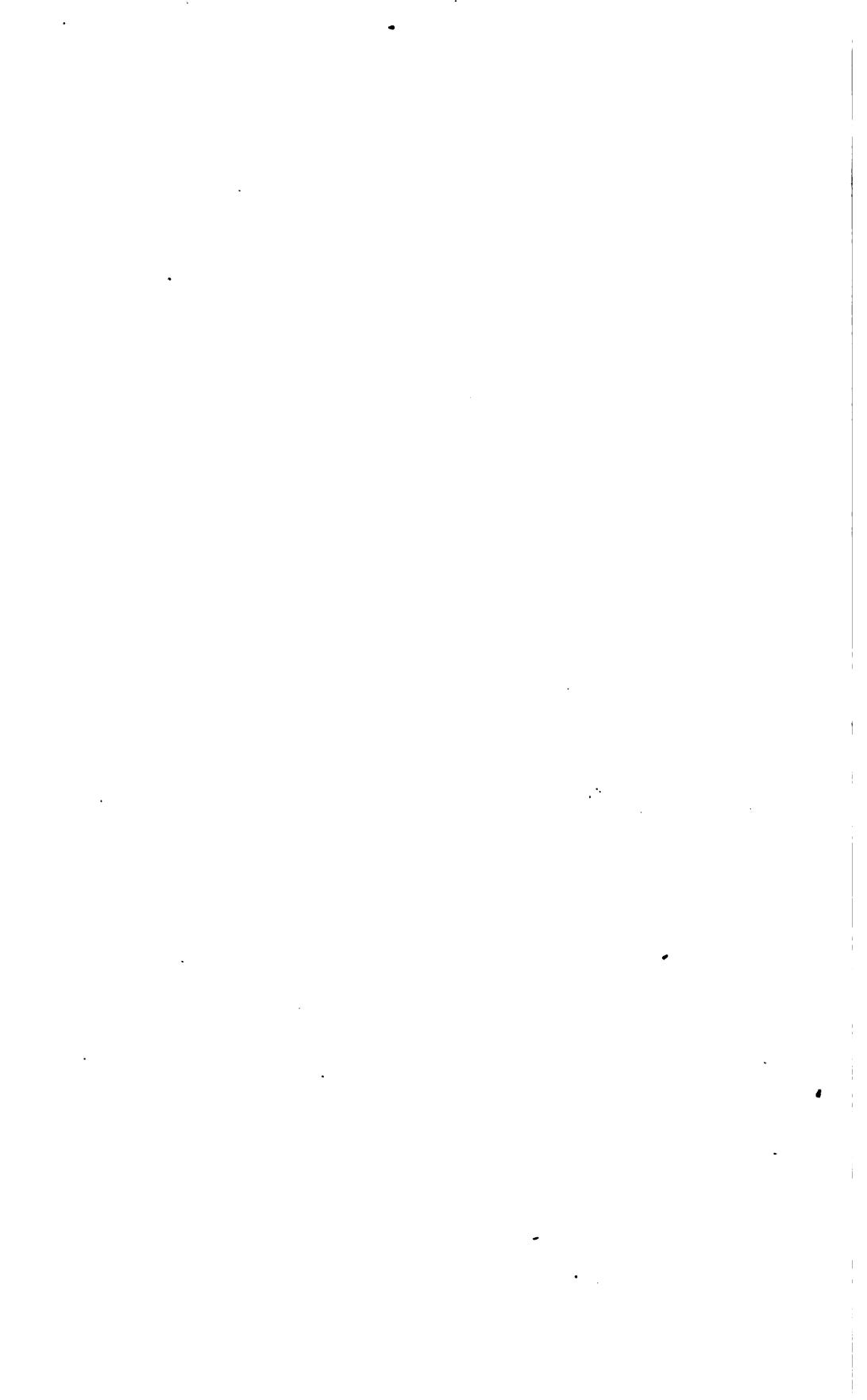
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REPORTS
T. H. Dana Jr.
OF
CASES
ARGUED AND DETERMINED
BEFORE THE
MOST NOBLE AND RIGHT HONORABLE
THE LORDS COMMISSIONERS OF APPEALS
IN
PRIZE CAUSES:
ALSO ON APPEAL TO
THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.
WITH AN APPENDIX,
CONTAINING ORDERS IN COUNCIL, NOTIFICATIONS, INSTRUCTIONS, ETC.,
RELATING TO PRIZE AND MARITIME LAW, ISSUED FROM
JUNE 12, 1809, TO AUGUST 15, 1810.

BY THOMAS HARMAN ACTON, Esq.,
OF THE MIDDLE TEMPLE.

EDITED BY GEORGE MINOT,
COUNSELLOR AT LAW.

VOLUME I.

CONTAINING THE JUDGMENTS IN JUNE, 1809, TO JULY, 1810.

BOSTON:
LITTLE, BROWN AND COMPANY.
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It has been long a subject of regret, that the decisions in the High Court of Appeals have never yet been published, notwithstanding many of them are of very considerable importance, and involve questions of national policy and general principles of jurisprudence. The design of this work, therefore, requires no other apology.

The author had at first proposed to publish only the most material of those cases which issued from the High Court of Admiralty or the Vice-Admiralty Courts, and are determined by the Lords Commissioners of Appeal in Prize Causes. It was afterwards suggested, that he might with propriety include in this work, cases upon appeal from various other courts throughout our colonies and dependencies, which are referred to the decision of his Majesty in Council.

In undertaking this task, he has been actuated by a sincere desire to be serviceable in his profession; and whilst he feels a degree of anxiety as to the opinion which may be generally entertained of its execution, he looks forward with hopes of advice and assistance from persons of eminence, to enable him to render the future numbers of this work more acceptable to the profession and the public.

MIDDLE TEMPLE.



TO
THE MOST NOBLE
RICHARD COLLEY, MARQUIS WELLESLEY, K. G.,
SECRETARY OF STATE FOR FOREIGN AFFAIRS,
ETC., ETC., ETC.,
THESE REPORTS
ARE, BY PERMISSION, DEDICATED, WITH THE HIGHEST RESPECT
FOR THOSE DISTINGUISHED TALENTS,
WHICH, FROM EARLY LIFE,
HAVE BEEN SO SUCCESSFULLY EXERTED IN THE SERVICE OF HIS COUNTRY,
AND,
DURING A PERIOD OF UNEXAMPLED DIFFICULTY,
CALLED HIM TO DISCHARGE THE ARDUOUS DUTIES
OF
FOREIGN MINISTER,
BY HIS LORDSHIP'S MOST OBLIGED AND
MOST OBEDIENT SERVANT,
T. HARMAN ACTON.
INNER TEMPLE,
November, 1810.

J U D G E S
OF
THE COURT OF THE LORDS COMMISSIONERS
OF APPEALS IN PRIZE AND COLONIAL CASES,
DURING THE PERIOD CONTAINED IN THIS VOLUME.

THE RIGHT HONORABLE EARL CAMDEN,
LORD PRESIDENT OF THE COUNCIL.

RIGHT HONORABLE SIR WILLIAM GRANT,
MASTER OF THE ROLLS.

RIGHT HONORABLE SIR WILLIAM SCOTT,
JUDGE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

RIGHT HONORABLE SIR WILLIAM WYNNE.

RIGHT HONORABLE SIR JOHN NICHOL,
JUDGE OF THE ARCHES COURT.

With others of their Lordships whose Attendance is not Uniform.

SIR CHRISTOPHER ROBINSON.

KING'S ADVOCATE-GENERAL,

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REPORTS OF CASES
DETERMINED IN THE
HIGH COURT OF APPEALS.

BEFORE THE MOST NOBLE AND RIGHT HONORABLE THE LORDS COMMISSIONERS OF APPEALS IN PRIZE CAUSES.

SWIFT, Davis, master.

June 10, 1809.

A neutral vessel recaptured from the enemy, may, if necessary for the mutual safety and interest of herself and the recaptors, be equipped, armed, and employed at her own risk, in protecting herself and the recaptors from the attack of the enemy's cruisers.

THIS was an appeal from the sentence of the Vice-Admiralty Court of Jamaica, which had sentenced the recaptors of the schooner Swift to restitution of so much of the cargo as had been saved from the wreck of the said schooner. The wreck took place in consequence of her being armed on her recapture, and employed in chasing such enemy's vessels as seemed disposed to attack the captor, his Majesty's ship Fisgard, then on shore in Samana Bay, and in considerable danger, from which she was released by the assistance of the schooner. The sentence of the Vice-Admiralty Court directed also the payment of the captors full costs out of purse by the appellants.

* *Swaby.* The case of the appellants is peculiarly distressing. This vessel has been the property of American merchants, and by no means therefore concerned in the protection of our vessels of war. She had been fitted out with a valuable cargo from

The Swift. 1 Acton.

Baltimore, besides \$10,000 in specie, which had been altogether lost in the wreck of the vessel. In this voyage she had been captured by a French privateer, and recaptured by the boats of The Fisgard in Sumana Bay, where she was employed by the captain of The Fisgard, which was then aground, in getting her afloat, and afterwards armed and compelled to protect her from the enemy's cruisers, in which occupation she struck on a coral reef: The conduct of the British commander was unprecedented and unjustifiable; since, on her recapture, she should have been permitted to proceed on her voyage without interruption, or at least, if it became necessary for the preservation of his Majesty's ship that she should be employed in this perilous enterprise, those, for whose safety she had exerted herself, should be liable to all risk and hazard attending the undertaking. Nor can it be denied, that any obligation she lay under to the recaptors had been completely required by the important service she had rendered them in getting their vessel afloat, and thus delivering them from falling into the hands of the enemy. From these weighty considerations we are encouraged to hope your lordships will reverse the decree of the court, and condemn the recaptors to restitution of the full value of the whole cargo, with costs.

Stephen, for the respondent. Your lordships must perceive this appeal is the offspring of ingratitude, and that to grant the [*3] *request of the appellant would be to commit an act of gross injustice. His Majesty's ship interests itself for the preservation of this schooner, and liberates her from the cruisers of the enemy, which, however, from their number, are very formidable: she is therefore armed for their mutual safety, and in attempting to destroy these vessels, that she and her protector might prosecute their respective voyages in security, she becomes a wreck. His Majesty's ship assists her in recovering almost all her cargo; and no one, not even the captain, when questioned whether she had any specie on board, dares to insinuate she had a single dollar. She obtains all that part of her cargo saved from the wreck, and after all these benefits conferred, the owners have the presumption to come before your lordships, and make a demand for all that part of her cargo lost in the wreck, including specie, which she appears never to have had on board, with costs. Certainly such an application will meet from the court that fate it so eminently deserves.

JUDGMENT.

SIR W. GRANT, [Master of the Rolls.] As to compensation for the specie, there appears no proof of her having any on board. The

Pipon v. Coutanche. 1 Acton.

accident which occurred was the mere consequence of a warfare she was obliged to carry on for her own preservation. She was not at all employed as a cruiser, but appears to have been armed only on the principle of self-defence; and probably nothing else could so effectually preserve her from the enemy: we therefore affirm the decree.

ON APPEAL TO THE KING'S MOST EXCELLENT
MAJESTY IN COUNCIL.

* PIPON, Appellant. COUTANCHE, Respondent. [* 4]

June 7, 1809.

Lords of fiefs in the island of Jersey not bound to discharge rents or incumbrances due on estates falling into their possession by the decease of their tenants.

THIS was a case of appeal from the judgment of the Royal Court in Jersey, by which the lord of the fief in question was condemned to discharge rent, and incumbrances due on an estate, falling into his possession by the tenant's decease.

The *King's Advocate* for the appellant. The law of the island recognizes the right of the lord of the fief, on the decease of the tenant holding under him to enter into possession of the premises, and receive for one year the produce thereof, if claimed by the heir; but in default of heirs, the lord of the fief becomes seized of the estate forever. And while the law is thus express as to the right of the lord, it makes no provision for the payment of any incumbrances, or arrears of rent, by the lord, which may remain due on the estate at the time of the tenant's decease, or accrue during the lord's possession. This is the point at issue in the present case. The respondent has obtained a judgment in the Royal Court of the island, by which the appellant has been condemned to pay either two thirds of the said rents, or restore to the respondent, as heir at law, two thirds of one year's produce of the estate, at the option of the lord. From this sentence he has appealed to his Majesty in council, and rests the strength of his application * on the express law of [* 5] the island, supported by the opinion of the frank tenants of the island, who have been examined by the Royal Commissioners on this point, and who then agreed in considering the lord of the fief not

Pipon v. Coutanche. 1 Acton.

bound in law to discharge the rent or incumbrances due on an estate so falling into his possession.

Dallas, for respondent. The law itself contains no express provision to exonerate the lord. Its silence has been more than counterbalanced by the uniform custom of the other lords of manors in the island since the year 1771, who have always discharged such incumbrances. The inhabitants of the island have felt themselves aggrieved by the exercise of this assumed right, and have warmly remonstrated to the government of the island against it. If there is any thing further necessary to invalidate the appellant's claim, the unreasonable and unjust nature of this appeal from the decision of that court, most calculated to ascertain the rights of his Majesty's subjects in that island, will not fail to have its due weight in bringing your lordships to a decision in support of the sentence of the Royal Court.

JUDGMENT.

SIR W. GRANT. If their lordships see the case in the light it presents itself to me, there can be no hesitation as to our decision. The law, as stated to us, has its foundation in the remotest antiquity, acknowledged by all, and even proved by the remonstrances made against it by several of the inhabitants to have been always taken in the * sense contended for by the appellant. Formerly the lords had greater privileges, and were enabled to exact even the personal services due to them by tenants of the fief. Of this, however, they were deprived in course of time; but the right now contended for still exists; and the report of the Royal Commissioners sanctions this right. The representation of the inhabitants only complains of the law itself. If the law be a bad one, it should be reversed. It remains for us only to decide according to the law as it now stands. To this the respondent's council has opposed practice since the year 1771. Where there is no law this may be a good criterion certainly; but it can never be supposed that the omission of some lords of fiefs to enforce their undoubted privileges can affect those of others. Such is merely an act of grace and favor on their parts, and is not in the least binding on others. It is therefore our decision, that the decree of the Royal Court be reversed.

Lempriere v. Le Brun. 1 Acton.

* AT COUNCIL.

[*7]

LEMPRIERE, Appellant; LE BRUN, Respondent.

A covenant to pay a common rent as seigneurial, binding, notwithstanding the said rent may have been before alienated from the fief, and only been repurchased by the lord.

THIS was also a case of appeal from the Royal Court of Jersey, praying that its judgment might be reversed, whereby it had been determined that a seigneurial rent, having been purchased of the lord of the fief and afterwards repurchased by the said lord, changed its properties as a rent seigneurial, and became a common rent, or *rent rotuiere et fonciere*.

Wetherell, for the appellant. By the law and usage of the island, there can exist no doubt that a seigneurial rent, which from any cause whatsoever has been alienated, and is again reunited or repurchased and vested in the lord, resumes its ancient quality of a seigneurial rent. This last species of rent is more valuable, as it is paid in kind from the produce of the soil, which of late years has much increased in value. Common rents are, on the contrary, paid at an established rate per bushel; most of the rents of the island being paid in wheat and other articles, the produce of the soil. In the present case, the law of the island is not only explicit and supported by the usage of all other lords, but the tenant, who is the present respondent, refusing to pay the said repurchased rent as seigneurial, has, on two different occasions, been condemned by the judgment of the court of the fief, (whose jurisdiction is admitted,) to pay it as a seigneurial rent; and has bound himself on each condemnation, by an agreement now on the records of that * court, [*8] to pay it as such forever, under pain of imprisonment in the fief. Hence the respondent is not only bound by the general law of the island, but also by his own particular act of obligation, to discharge the rent as seigneurial.

Dallas, for the respondent. Respecting the general law of the island, no authority whatever has been cited, no text writer has been referred to; the usage alone has been opposed to the dictates of the plainest reasoning, for it is evident that, after the complete alienation of a seigneurial rent, it becomes *routouriere*. And though it may return, by purchase or otherwise, to the original lord, he can

Lempriere v. Le Brun. 1 Acton.

only hold it in right of purchase or agreement, and not as lord of the fief, having once abdicated this title. Had the judgment of the court of the fief been enforced, as it might, no doubt, the respondent would then have become the appellant in the Royal Court. This, it was apprehended, would give him an advantage; therefore the lord himself had appealed from his own court, (the court of the fief,) where his influence, amongst other considerations, had twice obtained him a decree in his favor, notwithstanding which he was, in the Royal Court, condemned in costs, and the rent determined to be payable as a common rent only.

JUDGMENT.

SIR WILLIAM GRANT. If you admit the two agreements or obligations, which have been signed by the tenant of the fief, there can be no possible mode of getting rid of the obligation to pay [*9] the rent as seigneurial, notwithstanding the judgment of the Royal Court of the island in favor of the respondent. The contract was not only made, but also adhered to, for some years, when the tenant refuses to abide by his contract, and again is convinced it is his duty to renew the obligation. He again refuses to comply with the terms of the instrument, and the lord, to confirm the right, appeals to a higher jurisdiction, where he fails to obtain the sanction he expected, and, therefore, brings the cause before the Supreme Court. I am not now able to ascertain whether the lord resumes his right by repurchase or repossession. Much would depend on the circumstances under which he entered into possession. Perhaps, and, indeed, from what has transpired, it would appear that the lord only held and derived his title by purchase. But when there are two express covenants to pay this rent, in the manner contended for by the lord of the fief himself, we cannot hesitate in deciding that the decree of the Royal Court be reversed.

The Elizabeth. 1 Acton.

BEFORE THE LORDS COMMISSIONERS.

* THE ELIZABETH, Trip, master.

[*10]

June 10, 1809.

A neutral vessel, sailing under the protection of a general British order, although deviating from her final destination for the purpose of landing a passenger, not thereby rendered fair prize.

In this case a Hamburg ship, sailing in ballast from the island of Martinique, bound for Portsmouth, in Great Britain, was, on the following day, met and captured by the private ship of war Camilla, Peter Graham commander, and carried into Antigua, where she was condemned as lawful prize to the captors, by the judge of the Vice-Admiralty Court of the island; from which sentence the owner, Peter Rucker, merchant and burgher of the free and imperial city of Hamburg, appealed, by the said master of the vessel.

Adams, for the captors. This vessel has been condemned in the court below, from the strongest suspicions of her having been engaged in an illegal trade, and from the proof of property exhibited being incomplete. In most of the ship's papers she has been described as the property of Rucker; but in that certificate she obtained from the custom-house at Martinique, immediately previous to her sailing, she is described as the property of Johan Daniel Kock. But the strongest grounds for her detention and final condemnation appear to be, that, having set sail from Martinique, expressly relying, as the correspondence before the court will show, on the British order of the 18th of February, 1807, she has violated the provisions of that order in two instances: first, in sailing from the island of Martinique in ballast, and not for the purposes of trade; and next, in deviating *from her course after leaving that island, which [*11] originally had been described as for England. It will be found that the order, under which this vessel sailed, had made no provision for the safety of vessels sailing in ballast, but solely for those vessels of Hamburg and Bremen, trading to or from the ports of Great Britain. Thus the manner of sailing, as well as the destination of the vessel, is accurately defined, and no vessel, under any other circumstances but those contained in the order, can have any pretension to claim its protection. This vessel sets out avowedly for Portsmouth, in Great Britain, and is immediately afterwards found

The Elizabeth. 1 Acton.

lying off and on, near the island of St. Kitts. This is attempted to be justified, by the necessity she was under to land a passenger in that island, who had interested himself extremely for the protection and security of this vessel in her passage to England. I must, however, suggest, there seems to be no imperative necessity for the ship's endangering herself, by landing this gentleman in St. Kitt's, since the communication between all those islands is very general and frequent. This, therefore, falls to the ground as a defence, and excites a suspicion that she was lying off that island for the purpose of carrying on an illegal trade, of which this supposed passenger was the confidential agent. There seems to be also something extremely suspicious in the mutual interest this passenger and ship take in each other. In Martinique and Barbadoes, he is solely anxious to procure this ship a safe passage, and obtains the opinion of the law officer of this last island, under which opinion expressly the vessel sets sail. Aware of the vigilance of our cruisers, she conforms as nearly as convenient to the order under whose protection she is assured of a safe passage, until she concludes she is out of [*12] *danger, and immediately alters his course, and runs directly for the island of St. Kitts. There certainly could be no ordinary motive for such an extraordinary change of destination. Here she is captured by the private ship of war Camilla, in the direct course for that island. From the concurrent circumstances of this vessel having a false description of property on board, having varied from her course, violated the requisitions of the order mentioned, and the suspicion, it is impossible not to entertain, that she was, if not actually engaged, about to engage, and set.sail with the intention to engage in an illicit trade. I am encouraged to hope that the decree of the court below will be confirmed, and the vessel condemned as prize to the captors.

Arnold, for the appellant. This vessel, it appears, had lain some time with a cargo in the island of Martinique, ready to sail for Europe; but her captain, being apprised by Mr. Elbers of his intention to send her to some port of Great Britain, in consequence of the occupation of the city of Hamburg by the French forces, relanded the ship's cargo, as he could not obtain permission to take out the said cargo from the government of that island, in consequence of altering his destination. To this he was advised by Mr. Elbers, who, to secure the vessel a safe passage, had gone expressly to Barbadoes, to consult the law officers there, as to the mode in which she should prosecute her voyage. By them he was informed the vessel might with safety prosecute her voyage, under the protection of the

The Zulema. 1 Acton.

order of the 18th of February. Relying on this assurance, which, also, was corroborated by the opinion of his Majesty's Attorney-General of Barbadoes, the captain, without ^{* 13]} hesitation, cleared out for St. Kitt's, to stand off that island for the sole purpose of landing this Mr. Elbers, to whose endeavors he was exclusively indebted for the prospect he had of returning to Europe with safety. In making for this island, the vessel was captured by The Camilla, privateer, carried to Antigua, and condemned; from which sentence her owner now appeals, and trusts that the nature of the circumstances under which the vessel sailed, the care and caution his friend has observed to insure her a safe voyage, the satisfactory manner in which the proof of property is made out, except in the instance alluded to, which originated solely in an inaccuracy of the port-officer in transcribing the document, and her exact compliance with the order of the British government, (except in procuring a cargo, for which the captain had no funds but in the island of Martinique, but from whence all exportation to this country was strictly prohibited,) will entitle this vessel to the protection of the order, and induce your lordships to pronounce the capture unjustifiable, and sentence the captors to restitution with costs and damages.

Adams, in reply, observed, the captors had never yet been in possession of the proceeds of the vessel.

JUDGMENT.

SIR WILLIAM GRANT. We order the vessel to be restored, and as we are of opinion there appears scarcely any ground for justifying the detention of the vessel, condemn the captors in costs.

*THE ZULEMA, Alston, master.

[* 14]

June 10, 1809.

Proof of a joint property with the enemy in a shipment, subjects such to condemnation. If the shipment be innocent, it does not necessarily affect the ship.

THIS was a case of appeal from the Vice-Admiralty Court of Halifax, Nova Scotia, in which the whole property of the appellants, both in the ship and cargo, had been condemned as prize to the captors, in

The Zulema. 1 Acton.

consequence of the enemy's being considered to have a share both in the ship and part of the cargo.

The King's Advocate and *Daubeny*, for the captors.

This ship has been condemned in consequence of the suspicious papers which have been exhibited in the court below, after permission had been granted to introduce further proof, by which the present appellant failed to substantiate the claim of sole property on the part of Foussat and Mann, and several other American citizens concerned in the ship and cargo. Foussat and Mann are the registered proprietors of the whole ship, and part of the cargo. This claim is, however, vitiated by the suspicious circumstances of the trade in which the parties had long been engaged, as well as by the ship's own papers, and others, which have been invoked into this cause from The Columbian Packet condemned in Bermuda, and also from The Titus. From these papers it appears the parties have been engaged in a trade on false grounds, and for false purposes. Foussat has a brother in Bordeaux, who acts for others in that country as a confidential agent, in making shipments nominally for account of his brother in America, (which the ship's papers prove,) but which the invoked papers give

the strongest grounds to suspect, are for his own and their [* 15] account. Amongst these papers one * is found in cypher, and another without any signature, but which, there is strong reason to believe are the writing of Justin Foussat, of Bordeaux, in which he speaks with great anxiety of a ship, which he in cant phrase denominates his eldest daughter, as containing part of his property, and which the particulars of her cargo mentioned, as well as the apprehension he professes to entertain that she may be finally condemned as prize, prove, almost beyond a doubt, to be The Zulema, which had about the same time been captured and carried into Halifax for adjudication. In another, the writers, merchants of Bordeaux, desire returns for three hundred and eighty-five baskets of oil, which number is found precisely on board The Zulema. The proof of property is therefore insufficient, or, rather, shows it to belong in part to the enemy, and this with the connivance of Foussat, at Philadelphia. If Mann be imposed on, he must seek redress at the hands of his partner. But there will be found no attempt even to prove that he was not also cognizable to the fraud. Hence the parties may be justly concluded to be equally interested in the fraudulent scheme, and the whole property a proper subject for condemnation.

Arnold and Stephen, for the appellant — The principal part of the objections, as to the proof of property, are inferential from a mysteri-

The Zulema. 1 Acton.

ous paper. There may be many other reasons for using such papers beside purposes of fraud. The manner, also, of bringing in these papers from the ships Columbian Packet and Titus, is highly objectionable, no opportunity whatever being given to the appellants to explain them, as they probably could to the satisfaction of your lordships by other documents. One part of the property remains, however, unimpeached, Mann's property in the ship's *cargo, [* 16] and freight. To permit the cargo in this instance to affect the ship, would be to carry the doctrine of prize farther than it has hitherto been attempted. While the points of evidence contained in the invoked papers are, at best, equivocal and uncertain, the original evidence, documents, and affidavits are clear and decisive as to the property of both ship and cargo. If even the identity of the writer of the letter alluded to were proved to be that contended for, there is in that letter no absolute averment of the property. This is merely founded on the strained inferences attempted to be imposed on the court in deficiency of conclusive evidence. There seems to be nothing even in the correspondence between the parties which can lead your lordships to discredit the proof of property; and so cautious have the owners been, that they have desired the appellant, who is their captain, to abandon a claim which had been made for goods, but which since they have ascertained not to be their property, though entered as such in the bills of lading. These goods, it appears, were not put on board by their own shipper, Foussat; nor was the master apprised whose property they were until the vessel had almost completed her lading, and, consequently, could not, without great inconvenience, reland them. The whole appears a fair and open transaction. The proof of property unimpeached, and the owners, therefore, entitled to restitution.

JUDGMENT.

SIR WILLIAM GRANT. The papers which have been exhibited in the court below, seem to produce nearly the same impression as those which have since been invoked into this cause. It appears from many parts of *both these papers that there was a joint [* 17] concern in the proceeds of this cargo between the Foussats. The three hundred and eighty-five baskets of oil, mentioned in the letter from the Bordeaux merchants, appear clearly to be shipped on their own account, and impeaches the whole proof of property on the part of Fonssat. Nor can it escape our notice that this sort of agency seems to have been habitual, and has no other object but that of injuring and evading the belligerent rights of this country. We therefore condemn Mr. Foussat's part of the cargo, as well as his half of the

The Titus. 1 Acton.

ship, though by no means as a consequence of condemning his part of the cargo, but from a deficiency of proof in the evidence of property, on which there is not that clearness which we could wish. As he appears the detected agent for covering enemy's property under false appearances, we cannot admit him to the benefit of exhibiting further proof. The cargo being perfectly an innocent cargo, the title of Mr. Mann remains unimpeached, and we therefore order that his half of the ship, as well as his proportion of the cargo and freight, be restored.¹

[* 18]

* THE TITUS, Cushing, master.

June 10, 1809.

Sentence of condemnation reversed in consequence of the shipper in the enemy's country fairly accounting to the neutral owner for the whole freight and earnings of the vessel. The claimants for part of the cargo admitted to exhibit further proof, although the ship is discovered to have mysterious papers on board.

THIS was a case of appeal from a sentence of condemnation by the Vice-Admiralty Court of Bermuda, on the ship and part of the cargo, as the property of the enemy, though claimed for several American merchants.

The *King's Advocate* and *Adams*, for the captors.

In this case, abounding with inconsistencies, the first that presents itself is, that this claim is made by Messrs. Bainbridge & Co., though the owner of the ship, Mr. Dumas, of Philadelphia, has, in a letter of instructions to his master, directed him in case of seizure by British cruisers, to have recourse to his friends, Messrs. Mullet & Co., residing in London, for advice and assistance. The whole transaction appears so replete with deception and fraud, that it will be found almost impossible to lay hold of any thing in one shape, which, on a more strict investigation, will not appear to assume a different form and complexion. We find the vessel described as altogether the pro-

¹ The property claimed by several other citizens of the United States was also restored; as it appeared by the papers exhibited, that they were shipped for their account and risk, and were such articles as were calculated to be disposed of by retail, in the respective shops of the claimants, who reside in Philadelphia.

The Titus. 1 Acton.

erty of American merchants, by the attestations of the master and shippers, corroborated by the evidence of the seamen, and confirmed by the papers on board, her pass, bills of lading, and register. This representation is totally overturned and falsified by an investigation of the papers and correspondence, which were evidently not intended for publication. The whole claim is not a little affected by the circumstance of Mr. Foussat (whose ship, The Zumela, was, within the present month, condemned by your lordships on account of gross prevarication and fraud) * having thought it his duty [* 19] to abandon a claim in this cargo for wine and plate, which claim was also prosecuted by the house of Bainbridge & Co. until within these few days. This has, perhaps, been effected by the solicitation of Dumas himself, who cannot but be apprised of the danger in which his claim stood, from appearing joined in a claim with a man whose character and connection with the enemy have been so manifestly developed. It will not be difficult to prove this vessel is similarly circumstanced with The Zulema just mentioned, and thence will appear to your lordships a property justly subject to condemnation with the costs of appeal. The principle of law, laid down so explicitly in the case alluded to, must embrace the present case; inasmuch as this vessel's papers, and the representations of her owner, attempt to cover the enemy's property, and defraud the belligerent rights of this country. Upon this principle, also, it will not be possible to admit the owner who thus fraudulently misrepresents the cargo, to the benefit of further proof, as to the ship or any part of the cargo. The general species of trade carried on between the ports of Philadelphia and Bordeaux, has been amply elucidated by the case cited, as well as many others not perhaps less in point. Most of the Bordeaux merchants, it appears, have agents in the United States, who have a convenient latitude of conscience sufficient to enable them to cover their employer's property, as that of neutrals. And were it not that persons conscious of fraud in themselves cannot sufficiently confide in each other, and, therefore, defeat their designs, by permitting the deception to become apparent in their private correspondence, wherein they cannot refrain from expressing their anxiety for the safety of this covered * property, and from making repeated [* 20] demands for credit on account, or quick returns for these falsely denominated cargoes, it would perhaps be impossible, such is the calamitous extent of this system of false swearing, that the rights of the belligerent should ever be enforced in cases of this description. It must be admitted, wherever there is reason to suspect a preconcerted system of fraud, there is the less necessity to exhibit positive and direct proof; notwithstanding which, the fraud will be most dis-

The Titus. 1 Acton.

tinctly substantiated in the present case, by the papers which were found in her possession at the time of the capture. This vessel is consigned to Justin Foussat, of Bordeaux, whose dexterity in this sort of trade has been already proved. He affects to be the mere agent for the neutral merchant, and while shipping goods for the joint account of himself, Foussat and Dumas, of Philadelphia, describes them carefully on oath the sole property of neutral merchants. This appears most conspicuously in Foussat, of America, having withdrawn the claim made for part of his cargo, a few days since. Mr. Dumas considers his case not so desperate, and, therefore, has appealed. The vessel, he contends, is solely and exclusively his property. To prove this, he produces the ship's papers. But in the correspondence between Foussat, of Bordeaux, and his brother, he describes the whole of the shipment, which he consigns him, as his property; specifies, like an owner, the sort of sales he should be pleased with; and inculcates the necessity of making him quick returns. This letter alone would have completely overturned the claim of Foussat, of Philadelphia, had it not been prudently withdrawn. It is signed by Louis, and addressed to

Charles Le Roy, but from a comparison with that addressed [* 21] by Foussat, to his brother, * and the exact correspondence of circumstances, minute descriptions, and numbers, there can be no doubt entertained that it was intended for Foussat, of Philadelphia, and written by his brother. In the latter part of this letter, the writer requests that a part of the passage money, which he remits by a draft on Foussat himself, may be carried to his credit. Passage money is, however, the earnings of the vessel, and, therefore, can belong only to the owner. In this instance, therefore, it appears that Foussat, of Bordeaux, avows himself a part proprietor. Upon comparing the sum for which he claims credit by the drafts of passengers in the ship, with the passage money, it will be found nearly two thirds of the whole. The zeal, anxiety, and pains which he takes to procure freight, passengers, and the manner in which he reduces the freight in favor of his brother's goods, shipped on board this vessel, prove him more than a mere agent. In fact, great part of the vessel is freighted with goods, for which Dumas appears never to have given any order, and in one letter, which is without signature, but appears also to come from Foussat, and is addressed to Mr. Hector, he advises him of having shipped for his account six tons of wine, which, in another part of this most fallacious correspondence, is said to be for account of Mr. Orthes. This Orthes is supposed to be the brother of Dumas, who had some time before left France on account of his embarrassment, and is perhaps described by this fictitious name in his sister's letter, lest this consignment, in case of capture, should be condemned as the property of a French citizen. These six tons of

The Titus. 1 Acton.

wine are, notwithstanding, found also entered for the sole account and risk of Dumas, in the ship's bill of lading. The representation, therefore, of the cargo of, the vessel *appears [*22] totally false, and can be only intended to conceal from the belligerent the nature of the trade in which the vessel has been engaged. The arrangement which Foussat makes in favor of his brother's part of the cargo, is such as might be expected, and he justifies it by stating that he had procured an equal abatement on a late shipment to the same person, adding also that it was principally as an inducement to other shippers, to freight the vessel, that he had put these goods on board at a higher nominal freight than usual. The property of the enemy, in several instances, is attempted to be protected, by describing it on oath, as that of neutrals, and the property of the vessel itself must appear subject to condemnation, from the circumstance of Foussat's claiming a credit for a considerable share in the earnings of the vessel, which can solely accrue to him as part owner.

Arnold and Stephens, for the appellants—As the counsel for the captors have rested the strength of their case on assimilating it to that of *The Zulema*, and have utterly failed in this expectation, the case of the appellants is thereby rendered the more simple and unembarrassed. With respect to the property of the ship, the proofs are full and complete. She is described by her pass, register, and evidence of the captain, as American property. Dumas built the ship, and continues to exercise the authority of an owner, with respect to the vessel, even after leaving his port, and throughout the whole voyage. The proportion of the ship's earnings, whether passage money or freight, which it is contended was placed to the credit of Foussat, at Bordeaux, is minutely accounted for to Dumas by the drafts of passengers on board, all made payable to himself, and which

*Foussat merely claims a credit for, as the agent of Dumas, [*23] transmitting by this mean part of the proceeds of his vessel.

Of these passengers, some had funds in America, and others had property on board, for which reasons they preferred giving drafts on American merchants for either freight or passage, and some even found it convenient to raise money of Foussat on similar drafts. The property of the vessel remains unimpeached. By the attestation of the master, the documentary and parol evidence adduced, the cargo also is proved generally the property of neutrals. Mr. Foussat, of America, having withdrawn his claim, is a striking feature of integrity in this case, and shows how unwilling the appellants were to have their appeal contaminated by any color of fraud, which it is pro-

The Baltic. 1 Acton.

bable they themselves were only acquainted with within these few days. The only doubtful part of the cargo remaining, is the shipment of wine, made, it is said, by the sister of Dumas, residing in France, to Orthes. Of this person, we are totally ignorant. The letters addressed to Orthes and Hector, one of which is in cypher, because they appear to be mysterious, are not, therefore, to imply a fraudulent intention. They are capable of explanation, and when it is considered how extremely unfortunate in almost every transaction of their lives, some of these correspondents, particularly Orthes, appears to have been, it would be the extreme of cruelty to deny the benefit of further proof to a wretched family, struggling through adverse vicissitude and unforeseen misfortune, with a sincere desire, as they express themselves, of obtaining an honest and honorable competence, by honest and honorable means, especially when [* 24] there is every reason to * believe the property in question is their last stake, and the solitary hope of their future years.

JUDGMENT.

SIR WILLIAM GRANT. From the testimony of the master, so clearly and forcibly corroborated by the ship's papers, and also from the exact manner in which the shipper has accounted to the claimant for the whole of the freight and passage money (the remittance made, appearing exactly to correspond with the earnings of the vessel); we are of opinion the proof of property is sufficient. We, therefore, order the vessel to be restored, and see no adequate reason to preclude the appellants from the benefit of exhibiting further proof as to the property still continuing to be claimed.

[* 25]

* THE BALTIC, Donaldson, master.

June 17, 1809.

Concealed contraband on the outward cargo renders the vessel on her return subject to condemnation. The misconduct or fraud of the supercargo attributable in a considerable degree to his employer, and affecting his interests.

THE property of this vessel, with the greater part of her cargo, condemned in the Vice-Admiralty Court of Bermuda, was claimed by W. Vaughan, merchant of London, for Richard Gernon, merchant of Philadelphia, as an American citizen, and sole proprietor.

The Baltic. 1 Acton.

His Majesty's Advocate. This vessel, however, attempted to be clothed with an American character, will necessarily appear, on a review of her conduct from her first sailing on the outward voyage to have quitted her original port with a cargo of goods falsely described, to have made a continuous voyage with these goods from an enemy's port to an enemy's colony, and for the account of the enemy's merchants residing in Bordeaux. This cargo is said to be shipped in the port of Philadelphia, on board the American vessel Baltic, which, with nearly all the cargo, is described to be the property of Mr. Richard Gernon. She is then said to be committed to Mr. Peter Payan, also an American citizen, as supercargo. This gentleman, however, has so far despaired of establishing his claim to that character, that he has deserted a claim made for part of the homeward bound cargo, by the present appellant for his account. This cargo will appear, by the correspondence exhibited in the appendix to the case, to be actually the property of Mr. John Gernon and other merchants residing in Bordeaux, where it was expressly shipped by them, on board the same vessel, which then was named The Hazen. These goods were by them consigned to * Messrs. Buckley & Co., of Philadelphia; and after this [* 26] vessel's arrival there, a false sale of both ship and cargo took place, by which Mr. Richard Gernon is made the nominal owner; a new register is made for this vessel on this alleged change of property, her name changed, a new captain appointed, and every thing being effected which could possibly give a plausible color to the fraud; the vessel sets sail under the charge of this Payan, who, it is evident, from other parts of this correspondence, accompanied her from Europe, as the supercargo for her owners in France. This last fact is proved from Payan's having a power of attorney consigned to him by one Marnin, of Bordeaux, empowering him to collect debts due to him. In this instrument he is described as then at Bordeaux, but residing at a particular street in the Isle of France. Thus Payan is discovered to be not only the agent for the enemy, but absolutely a subject of France, in which his wife then resided. While in the Isle of France he is found busily employed in various speculations, many of which are contrary to the tenor of the instructions received; and some of the cargo claimed for Richard Gernon appears to have been shipped in contradiction to his orders. Several bills of sale appear among the ship's papers in the handwriting of Payan, all made as to different merchants, but evidently calculated to mislead and cover the intended fraud. One paper, affectedly denominated "An account current between John Gernon, of Bordeaux, with Messrs. Saulnier & Co., of the Isle of France, as relating to the cargo

The Baltic. 1 Acton.

of his ship *Julia*," exhibits the proceeds of this vessel, as exactly corresponding with those of the Baltic, and is now submitted to be [* 27] * an account of the sales effected from The Baltic's cargo. In this the cargo appears to be actually of the same value as that of The Baltic; and there is also credit given for an adventure of cordage equal in value to that cordage brought out in The Baltic. This last-mentioned circumstance is alone sufficient to render her lawful prize, as being contraband goods on her outward bound voyage. The funds for the return cargo being deficient to freight her back, Payan received instructions from Gernon, of Philadelphia, to lade her only with such goods as were *bonâ fide* American or neutral property. This caution was unattended to, and in Payan's own account book there is a long list of those goods shipped for the enemy, and even the initials of the several owners affixed to each article, which are, notwithstanding, in the bill of lading described as the property of Gernon, in Philadelphia. On account of Payan's funds failing in the island, he writes to his insurer to reduce his former insurance of \$14,000 to \$4,000, as he cannot raise a fund for any greater proportion of the cargo; yet, in the claim which was made in his favor, there was included value to a much greater amount. This, therefore, proves uncontestedly that the representation of the property is altogether deceitful, which is even avowed in part of the correspondence of these inimical merchants, who congratulate their friends in France that the goods shipped to them will have all the benefit of the *acquit a caution* or cocket, by which the property was expected to be secured. The cargo, from its nature, cannot be doubted to be destined to France, the mother country. This supposition is supported by the testimony of several papers on board, and from several letters directed [* 28] to persons in Bordeaux, which * Payan is requested to deliver in person. Whether they were to arrive then *via* America, or not, appears of little consequence, since there appears no doubt that, at best, it would have been only a continuous voyage from the colony to France. The natural inference, therefore, is, that the whole voyage was undertaken in France, and the proceeds of the outward and return cargoes are solely to be appropriated to the use and profit of the enemy's shippers, either in France or in a colony remarkable only for fitting out privateers, and vessels of war, to the great detriment of the trade of this country in those seas; which last inference is strongly corroborated by the contraband in the outward cargo. Hence it is submitted, the vessel and cargo are equally liable to condemnation.

Adams and Stephen for the appellant. The conduct of the super-

The Baltic. 1 Acton.

cargo has deservedly cast a shade of doubt and suspicion over this transaction, which it will, perhaps, be difficult to remove, even as it appears to affect the interests of Mr. Richard Gernon, whose sole culpability has been the confidence he seems to have indiscreetly reposed in a dishonest agent. His fraudulent design is admitted; but it also is to be considered that he has exceeded, and even violated in many instances, the express letter of his instructions. In the case of The Bedson, Captain Jones, however, the owner, under similar circumstances, obtained restitution; and it would be a case of extreme hardship should the owner of this vessel not be admitted at least to the benefit of further proof, when there appears so great a necessity for a careful distinction throughout, in order to ascertain which is really the * property of the enemy, and [*29] which that of neutrals. The accounts exhibited as kept by the supercargo are, taken together, completely unintelligible, except your lordships admit an hypothesis, which the custom of traders will well warrant, namely, that Payan, in order to dispose of the cargo to the best advantage, was in the habit of making out various accounts of imaginary sales, by which he might regulate his conduct when he came into the market. This supposition is strongly supported by the circumstance, that no sale was in fact made on the exact terms computed in these various accounts of sales found amongst his papers. In his letters to the owner, he assures him of returns to the amount of \$49,000, for which it appears he had funds in the outward cargo, and in bills of Sonia & Co., who were the contingent consignees in case of emergency, the vessel being chiefly intrusted to the supercargo under the most definite and express letter of instructions. Throughout the whole transaction there appears the utmost fairness and sincerity so far as respects Mr. Gernon. The distinctions between his property and others are faithfully and carefully made: The claims he now submits are unconnected altogether with those of the enemy, as appears by the most suspicious of the papers referred to. Payan claimed for his own goods, and also those of the enemy, well knowing that Mr. Gernon would not make him a compliment of his conscience to cover the goods as those of a neutral merchant. In one even of these papers, pointed out by the counsel for the captors, is a list of every article belonging to the enemy, and no part of these goods are comprised in this claim.

*[SIR W. SCOTT. You must perceive that this adventure [*30] is a very considerable part of the whole cargo.]

'Tis true, in part of the correspondence Payan apprises Mr. Gernon the cargo is his; but this should be taken merely as a phrase applying to the general cargo, for he had received express permission

The Baltic. 1 Acton.

to freight the vessel, provided such goods were neutral property. The letters even of the owner to Payan while in the Isle of France, are abundantly sufficient to point out his property. In these letters the several merchandises he wishes are ordered, and these are also found in the ship at the time of her capture, and for these solely a claim is now set up. The attempt to confound the cargo of The Baltic with that of The Julia, is absurd. The number of bales of each commodity are totally different, though the commodities themselves, it must be admitted, are the same, as they comprise the general exportable produce of the country. Though the Isle of France be not a place interdicted to neutrals, or subject to no peculiar colonial restriction, this vessel appears to have cautiously set out with an almost certain hope of security from proceeding to America, for which country she had several consignments on board. The vessel's character has been attempted to be deduced from the character of the supercargo; and she has even been traced to Bordeaux without any foundation for such a latitude of inference from facts or papers. That an owner should select a Frenchman to act for him in a French colony should not require any explanation; and though his wife reside in France, Mr. Payan is a naturalized American citizen, possessed of a freehold

[*31] property in that country, and hence protected by the national character. *The assumption made from Mr. Payan's

name being inserted in the power of attorney, as an inhabitant of a particular street in the Isle of France, is inconclusive as to national character, as these instruments are sometimes left in blank, for the future insertion of any name necessary or convenient to the parties, as is sometimes the case with respect to inheritable bonds in Scotland. The instrument being transferred to Payan in America, was taken out by him, and probably not filled up until his taking a house or apartments while he remained in the island. Whatever may have been the character or conduct of this man, it is necessary, to affect his property, to show that Mr. Gernon, of Philadelphia, was also a party to the intended fraud, or at least connisable. The charge of carrying secretly contraband outwards in any quantity is only supported by the evidence of one person on board, whose testimony should be received with caution, as his evidence is not supported by that of any other person in the ship as to so large a quantity. Two cables and two hawsers only are said by the mate to be disposed of by the captain, which is not improbable, from the low price they brought, were damaged, or old articles taken from the ship's own stores. It is impossible to believe such a sale was amongst the actual motives of the voyage to that island, in which case alone such a traffic would be attended with fatal consequences

The Baltic. 1 Acton.

to her, on being afterwards captured. The enemy's goods on board are openly and avowedly carried as such. Had they been secretly conveyed with a fraudulent intention, the vessel would only have incurred the sentence of condemnation on such part of her freight and cargo; and *if the claimant had been considered [*32] by your lordships as a party to the fraud, in any way, it would perhaps follow as a consequence, that he should be precluded from the advantage which possibly might arise from exhibiting further proof. But this cannot be extended to the present claimant, who seems to have suffered in his credit solely by the insincerity of his agent, and to be in danger of becoming the victim of a fraud not his own.

Dallas in reply — On the circumstance of the concealed outward contraband alone, I might rest the impossibility of attending to the claim of Gernon. With the greatest secrecy imaginable two cables and two sets of standing rigging appear to have been brought out in this vessel, and disposed of, with only the privity of one seaman on board, to the enemy. The circumstance of the concealment too plainly discovers the intention of fraud. A small quantity is taken out in this ship purposely to escape observation or detection. It is worthy of observation, that all the parties engaged are Frenchmen born; Richard Gernon alone appearing to have any title to protection from residence in America; that this cargo is received one day from France and exported the next to her colony; that a new master is appointed to this vessel, aptly suited to carry Mr. Payan's speculations into effect, and totally subservient to his will; that the supposed funds of R. Gernon are precisely the same bills he receives from his brother in Bordeaux. The adventure must then have originated in France, and must have been conducted confidentially for the interest of French merchants.

* JUDGMENT.

[*33]

SIR W. SCOTT. There can be no doubt that Mr. Gernon must have been aware of the fraud intended, if not a confidential party to it. We, therefore, affirm the sentence of the Vice-Admiralty Court condemning the ship and cargo.

The Pennsylvania. 1 Acton.

THE PENNSYLVANIA, McPherson, master.

June 28, 1809.

The master or crew of a neutral vessel captured, not bound to assist in carrying the vessel into port for adjudication. Resistance to the captors by the master or crew must be proved to have been actually made, in order to subject the vessel to condemnation on the principle of rescue.

THIS vessel, on a voyage from Trieste, in the Adriatic, to Canton, in China, was captured by two British cruisers in the Mediterranean, and possession taken by sending three persons on board her, who being unable to navigate the vessel, the neutral captain continued to direct her course according to the instructions of his owners, refusing to carry the vessel into Malta for adjudication, as required by the prize-master. Immediately after passing Malta, she was boarded by a third privateer, and carried into Malta, where the claim of Messrs. Wilcox & Co., of Philadelphia, as neutral and sole owners, was rejected, and the ship condemned as having been rescued from the original captors.

Stoddart and Harrison for the captors — This vessel has been condemned in the court below, on account of the resistance she appears to have made to the exercise of the acknowledged belligerent right of search; a right which, if once permitted to be violated by [*34] neutrals with impunity, must involve all *maritime nations in a series of calamities, cruelty, and bloodshed. That indulgence and lenity now shown to vessels boarded on suspicion, would no longer be politic or justifiable; and the interest of the captors would point out the necessity of rigor and severity in compelling vessels, under circumstances of suspicion, to enter those ports best calculated for legally investigating the claims of the respective parties. The evidence of the prize-master who was left on board, corroborated by his own men, and one of the ship's crew, proves, that at the time of his taking possession, he would have obtained more men, in consequence of the captain's suggesting that his men would not work the vessel into Malta, if he had not been assured by him, almost immediately afterwards, that the men had consented, at his request, to navigate the vessel into that port. As soon as the vessel was supposed to be out of the reach of danger from the privateers which made the capture, the captain threw off the mask, and assured the prize-master he would never again carry a ship under his command

The Pennsylvania. 1 Acton.

into port for adjudication, as he had before suffered severely for so doing. He then called his men together, assured them he would not permit the vessel to be carried in, and after demanding the ship's papers, which had been left in charge with the prize-master, and which he surrendered through apprehension and intimidation, the vessel proceeded, by his direction, on her course towards the straits of Gibraltar. The captain assured him of his safety, and promised to send him on board a Danish vessel then in sight. In this state of things she was again boarded by a British cruiser, and carried into Malta. There is no attempt made to impeach the proof of property; but the sole ^{*}circumstance of the rescue at- [*35] tempted must appear sufficient to affect the ship and cargo.

(The private adventure of the master having been restored by consent.) Hence it is submitted, the sentence of condemnation should be affirmed, upon the principle which regulated the decision of this court in the case of *The Washington*, where no actual force had been employed, but the existence of a conspiracy to retake the vessel had been considered fatal to the interest of the owners.

Arnold and Stephen for the appellants and owners—In this case there arises a difficulty from the nature of the testimony of two interested parties, who appear to have different motives for giving these inconsistent and contradictory statements. The master, mate, and seamen, with a solitary exception, agree in stating the anxiety of the master to have a perfect capture made of the vessel, probably that he might not be responsible hereafter to his owners for a neglect of their interest, or to the captors, should any attempt be made to rescue the vessel by his crew. The only witness of the ship's crew, who supports the statement of the prize-master, is a person deserving little credit, from the resentment which appears to have actuated him on account of his being punished for disorderly conduct and inebriety. The remaining part of the crew confirm the statement of the captain, that he openly avowed the crew would not work the vessel into port, and that the prize-master in consequence hailed the privateers, demanding more men to navigate the ship. This request was not complied with, solely because there appeared several other vessels in sight, which the privateers were anxious to capture. Independent, however, of the contradictory part of the evidence adduced, there is one point in ^{*}which all are agreed, that no force [*36] was employed; and this alone must obviate the inference attempted to be drawn, that the principle upon which *The Washington*¹ was condemned is applicable to this vessel, and will operate on

¹ This case is not reported.

The Pennsylvania. 1 Acton.

your lordships, to pronounce against the appeal. In that case a dangerous conspiracy was proved to exist, and the crew had been previously armed to carry the proposed rescue into effect. Taking, therefore, that part of the evidence in which all are agreed, that no resistance was made to the prize-master, but that solely in consequence of the inability of the captors to work the ship; the vessel continued to hold on her original course, it remains for your lordships to decide on a very circumscribed, though very material point of law, whether in all cases of capture the master and crew are bound, at the peril of the confiscation of the vessel or her cargo, to navigate her to such port as the prize-masters, or those in custody of the vessel for the captors, shall please to direct.

JUDGMENT.

SIR W. GRANT. We cannot see that any such duty is imposed on the master and his crew. They owe no service to the captors, and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their own peril. In this case the captain performs a duty he [*37] conceives * he owes to the owners. He will not act against their interest, nor will he attempt to prosecute their interest by any violence on his part or that of his crew. Neither he nor they are found to make resistance. The captors, therefore, are left to pursue their separate interests; they are unable to navigate the vessel and the captain resumes his command. What effect a compromise or agreement to navigate the vessel into a particular port, made by the master and his crew to the captain of the privateer, on his capture, (without experiencing any undue influence either arising from apprehension or compulsion,) might have on the master or crew, and whether they might not thereby be comprised within a new obligation, is not now our duty to determine. It might, probably, raise a very different question had any such agreement been here proved. As, therefore, there appears no actual grounds for the detention, and subsequent sentence, we reverse the decree, and order the vessel to be restored, each party paying their respective costs.

The Jane. 1 Acton.

*JANE, Lynch, master.

[*38]

June 28, 1809.

Notwithstanding circumstances of suspicion in the general trade of an alleged neutral owner, admitted to the benefit of further proof.

THIS was a claim for sixty hogsheads of sugar, part of the cargo of The Jane, as the property of Henry Cheriot, of New York, an American citizen. This vessel was captured on a voyage from Martinique to New York, and carried into Antigua, where proceedings were instituted against the ship and cargo, as the property of the enemy. The ship and cargo, except the sixty hogsheads claimed for Henry Cheriot, were ordered to be restored, from which sentence he therefore appealed.

Adams and Stephen, for the captors. This claim is founded merely on the testimony of the captain, who grounds his opinion of the property claimed being actually that of Mr. Cheriot, on the circumstance of Mr. Cheriot's having acquainted him that it was his property, and that he has reason to believe it was purchased for him, as a part proceeds of two or three outward shipments to that island. In the captain's answers to the interrogatories no mention was made of Cheriot, though several American merchants were stated to be the sole proprietors of the whole cargo. Considering that the name of Mr. Cheriot is not unknown in the Admiralty Court, and that frequent claims have been made for goods alleged to be his, but which have afterwards been abandoned, it appears rather strange that no attempt has been made, after twenty-six months' interval since her condemnation, to illustrate this claim by the introduction of more *satisfactory proof. Under these circumstances it is submitted the court will at once proceed to condemn the goods as the enemy's property.

Arnold, for the appellant, submitted to their lordships that he was instructed to require permission to present further proof, as to the property. It consisted of a series of letters and an affidavit, which would remove all shadow of doubt on the subject of property.

SIR W. Grant directed that further proof should be introduced.

VOL. I.—ACT.

The John. 1 Acton.

JOHN, Mosher, master.

June 27, 1809.

Ship and cargo restored.

Perishable commodities, carried from the enemy's country to a neutral port, with a *bona fide* intention of disposing of them in that port, permitted to be exported to the enemy's colonies, in consequence of being unable to sell them, as intended.

In this case the master of the brigantine John, on behalf of the asserted owners, appealed from the sentence of the Vice-Admiralty Court of New Providence, condemning the ship as engaged in an unlawful trade with the enemy's colonies, and part of the cargo for deficiency in the proof of property. The asserted proprietors were Messrs. Lippet and Rogers, merchants of Providence, in Rhode Island, for whom the claim had been originally made, as citizens of the United States. Prior to her final condemnation the judge had ordered further proof, on which part of the cargo had been restored.

Swabey and Stephen, for the captors. This vessel has been detained and finally condemned, with part of her cargo, from [* 40] a conviction in the mind of the judge in the * court below that the pretended importation of the goods in question was fraudulent and collusive, and that the owners were engaged in a course of traffic unauthorized by the general law of nations, and contrary to the tenor of his Majesty's instructions. This vessel had set sail from New Providence for the Havana, with a cargo of goods, principally provisions and spirituous liquors, which had been but a few days before imported in a vessel, The Columbia, direct from Amsterdam. This last vessel had, it appears, been engaged for a length of time in a trade from Holland to the port of Providence, importing the produce of that country, which, almost as soon as landed, were shipped on board her associate in this contraband trade, (The John,) and conveyed by this circuitous mode to the enemy's colonies. An offence of this nature could not be too severely punished; but the guilt was considerably increased by the reciprocal advantage the enemy was found to derive from the supply of colonial produce, which, by the same circuitous mode, was continually pouring into the ports of Holland, and other enemy's ports in Europe, through the medium of the two vessels mentioned, conjointly with a third, whose last voyage appears to have been from Trieste, and part of whose cargo found, at the time of the cap-

The John. 1 Acton.

ture, on board The John. The claimants have endeavored to justify this trade, by different attestations of themselves and others that these goods were originally destined for sale on their arrival in Providence; that part of them was sold there, and on the continent of America; that, after exposing them to sale at auction and otherwise, they were compelled to ship them for the Havana, being perishable commodities; and that this circumstance sufficiently justified the trade in which, *from unforeseen accident, they [*41] were compelled to engage in. Notwithstanding their design explicitly appears to have solely in view to color this trade, in itself so fraudulent, the ship papers, by which it was hoped a legal complexion might be given to the whole transaction, were replete with inaccuracy, misrepresentations, and suppressions of so glaring a nature, that it was apparent they had been constructed for the purpose. In the voyage of The Columbia, the master, though directed to repair to St. Petersburg for part of his return cargo, takes the liberty of returning direct from Amsterdam, assigning some vague reasons for his conduct. In the same manner the master of The John, at the Havana, violates the instructions of his owners, and brings to Providence an assortment of goods differing in quality and price from those ordered by the asserted owners. This is attempted to be justified on the plea of his acting as supercargo, with a discretionary power vested in him for the benefit of the owners. These vague attempts to cover a fraud so glaring will most clearly be exposed, on an examination of the ship's papers and the correspondence relating to the colonial and European cargoes, and most probably induce your lordships to consider the trade illicit, and the ship and goods claimed subject to condemnation.

Dallas and Jenner, for the appellant. The question before the court is extremely circumscribed and simple—Was this a continuous voyage? This is negatived by the circumstance, that the goods, on arriving by the ships Nancy and Columbia, of whose cargoes The John's was composed, were landed and exposed to sale; a considerable part of The Nancy's was disposed of, arising, probably, from its superior nature, and a *considerable portion of it was stored in the United States. The Columbia's cargo being perishable, and having no great demand, was not likely to be disposed of before it should be considerably reduced in its value; a greater proportion of her cargo, therefore, is shipped for the Havana, as a ready market, as well as for other ports in the United States. The judge in the court below restored the part of the cargo imported by The Nancy from Trieste, as an admitted

The Hope. 1 Acton.

neutral port, and ordered further proof of the remaining part of the cargo's having been imported with a *bonâ fide* intention of disposing of it in the United States. It has been improperly asserted that this vessel was exclusively engaged in this sort of trade; the fact is directly the reverse. During the five years the captain has known her she has made various voyages to different ports; sometimes returning in ballast, and at others supplying Gibraltar with provision. Since the sailing of The John, a great proportion of The Columbia's cargo was sold in America, which indisputably proves the real intention of the owners to be consistent with their neutral character; and even of that carried out in The John a considerable portion had been purchased by the captain, and carried out by him as his own venture. Hence it is just to infer, that the intention of the claimants was perfectly justifiable and upright, and that the property claimed should be restored.

JUDGMENT.

The goods were ordered to be restored to the claimant, and the costs of the captors granted.

[*43]

THE HOPE, Dobell, master.

June 27, 1809.

Condemnation of a shipment of the enemy's colonial produce, though colorably transferred to a neutral merchant, and bills given for the amount.

THIS was a claim preferred by the master of the vessel, for a quantity of tea and sugar, part of her cargo, as the property of J. P. Longchamp, citizen of the United States of America, which, with the remainder of the cargo, had been condemned as prize in the Vice-Admiralty Court of Halifax, in Nova Scotia.

The *King's Advocate* for the captors. The manner in which this claim is attempted to be supported is a further illustration of that system adopted by the enemy's merchants, for supplying the mother country with the produce of her colonies. The property now claimed was landed but a few days preceding its reshipment for Messrs. Chageray & Co., of Bordeaux, from Guadaloupe and the Isle of France, for a Mr. Halbran, who is detected, by a correspondence annexed to

The Hope. 1 Acton.

the case of The Falcon, (which is on the list of causes for your lordships' decision, and which has been invoked into this cause,) to be engaged as agent in America for this house of Chageray & Co., under a special contract executed at Bordeaux, by which he was empowered to act for their interest, in making colorable shipments and consignments to them in Bordeaux. Of the profits arising from this trade he was to derive one third, and, to facilitate this fraudulent scheme, immense credits had been opened for him by these Bordeaux merchants in various parts of the colonies, in Hamburg, and in France. By these means, it was expected that a most extensive commercial communication could be kept up between the French colonies and the mother country, or her European acquisitions; * and the contract stipulated that this agency [*44] should continue for the space of three years, for the mutual benefit of the parties. Happily, however, this has been developed by the papers of The Falcon, which have assisted in enabling us to prevent the success of a fraud, which might have been carried on with the assistance of any kind compliant third party, such as Mr. Longchamp, to the great injury of this country, and without much apprehension of detection, the fraud of these ingenious gentlemen having been concerted with very considerable dexterity. The facts of the case require little elucidation; the papers furnished by the appellants themselves invalidate their claim. They admit the goods are the produce of the enemy's colonies, or were imported from thence by the ship Peace but a few days previous to the reshipment for Bordeaux; that these goods were consigned by Ludlow & Co., of the Isle of France, to Dashwood, of New York, subject to the orders of Chageray & Co., of Bordeaux; that these goods were accordingly delivered to Halbran, under orders from Chageray & Co., of Bordeaux; that a sale took place of the goods, for which Longchamp passed his bills at long dates. These goods are put on board, and consigned to Chageray & Co., by Longchamp, nominally for his own account and risk. The fraud requires no further explanation, since it is impossible not to see that these persons have merely a fictitious property in this part of the cargo, which has been transferred from one to the other without receiving any valuable consideration, and merely to give a feasibility to the transaction; nor can your lordships hesitate to condemn the property, as clearly detected to be that of the enemy.

* *Stoddart and Stephen*, for the claimant—There is the [*45] most just reason to object to the introduction of the papers so improperly invoked, if at all invoked, into this cause from The

The Sophia Elizabeth. 1 Acton.

Falcon. There has been no sufficient notice given of the intention to introduce them; consequently, all explanation on this part of the evidence, is impossible, not having been furnished with any matter to elucidate or explain this contract, contended to have been made between Halbran and Chageray & Co. The ship's papers themselves, the attestation of Longchamp, the belief of the master and crew, strongly establish the claim disputed. Longchamp is no where accused of knowing the goods were originally the property of Chageray & Co., or their agents. The bills continue afloat eight months after the purchase is made, and are negotiated into the hands of persons not at all connected with the sale in question. The papers in the appendix prove the transfer of property to be fair and unimpeachable, and these were the only papers ever introduced into this cause in the court below. It is admitted the goods were consigned from the French colonial house to the firm of Ludlow & Co.; that these were transferred to their resident partner, a neutral merchant in New York, to be consigned to Halbran. But it cannot be contended that this is a necessary proof of preconcerted fraud. If so, all the parties must have been acquainted with the fraud, and accessory. This introduction of three distinct parties unnecessarily into the scheme for imposing on British cruisers, appears strange in the extreme, when Ludlow & Co. could as effectually cover the fraudulent design at once, by shipping them for the account of neutral merchants. From the facts proved by the papers really in the cause, nothing can [* 46] *be inferred to affect the interest of the claimant, and against the introduction of The Falcon's papers, we feel it our duty strongly to remonstrate.

JUDGMENT.

The goods claimed for Mr. Longchamp, were condemned as the property of the enemy.

THE SOPHIA ELIZABETH, Prott, master.

June 30, 1809.

Condemnation for a breach of blockade of the rivers Elbe and Weser.
Relaxation of blockade made in favor of the Hanse Towns by the British government in 1806, not sufficient to sanction a foreign trade to the ports of the enemy.

THIS was a leading case of appeals from the sentence of the High

The Sophia Elizabeth. 1 Acton.

Court of Admiralty, condemning The Sophia Elizabeth, and two other vessels similarly circumstanced, for a breach of the blockade of the rivers Elbe and Weser. In the High Court of Admiralty, a claim was made for the cargo, as the property of F. W. Schultz, and others, burghers and merchants of the imperial city of Bremen. The cause came on for hearing, and the judge directed it to stand over, in order to enable the parties to obtain information with respect to any permission, from his Majesty's government, for the transportation of goods in small vessels between Bremen and Tonningen, during the blockade of the Elbe and Weser; and finally condemned the cargo, as prize to the captors.

Jenner and Stephen, for the captors—The arguments which may be made use of on this occasion, are applicable to three other cases of appeal now on your lordship's list, under similar circumstances; and the decision in this case will necessarily involve the fate of the cargoes of the other two vessels, which have also been claimed as the property of neutral merchants. The first and most material question for decision is, whether the voyage which this vessel had * undertaken, was a breach of the blockade of the river [* 47] Weser. By an order of council, on the 16th April, 1806, the rivers Ems, Weser, and Elbe, were declared to be blockaded, and notice generally given of this circumstance. Immediately afterwards, application was made to the British government for a relaxation of the blockade, so as to allow the inhabitants of the Hanse Towns to carry on their trade by a navigation in small vessels over the Watten or Flats, in the same manner as had been permitted in the former blockade. This permission was granted, as appears by the letter of Mr. Thornton, dated May 20th, 1806, particularizing the free passage of the Watten between the Eyder, Elbe, Weser, and Jahde, to be permitted, in the same manner as had been before granted to lighters and small vessels. The reason assigned by the petitioners for this permission, was its necessity, in order to prevent the remaining trade of the city of Bremen being transferred to Embden, and the terms on which the grant had been made in the former instance, in 1804, were, that the permission should not be abused, or any advantage taken so as to compel his Majesty to revert to all the strictness of the blockade. The same reason existed for this requisition in 1806; and if not actually expressed, it was perfectly well understood that on such terms alone, the permission would have been granted. On the 16th of May, another order of council was issued, declaring the ports from the Elbe to Brest harbor, in a state of blockade. By this order, no vessels were permitted to clear out from any of these ports, except those neutrals

The Sophia Elizabeth. 1 Acton.

not laden in any of the ports of the enemy, or destined thereto, and whose cargoes neither consisted of enemy's property, or con-
[* 48] traband of war. Of the nature of this order the *inhabitants of Bremen were perfectly aware, as, in the correspondence annexed, a letter from one of the parties, dated the 31st of May, proves. Notwithstanding which, the claimants, on the 5th of July, entered into a charter party to freight the vessel with goods for Algesiras, in Spain. The claimants, despairing of being able to procure a free passage for the vessel, with her cargo on board, out of the mouth of the Weser, sent her in ballast to Tonningen, and informed the master that a cargo should immediately follow her in lighters over the Watten to Tonningen, as the only probable means by which the vessel might escape the vigilance of the British cruisers. The vessel arrived at Tonningen, when she took on board the cargo thus conveyed after her, and sailed from thence on the 20th of August, for Algesiras, on the passage to which place she was captured, and carried into Plymouth. From a review of the mode adopted for procuring this vessel a probability of a safe passage, it must appear, that with the most accurate knowledge of the intention of our government, and the extent of relaxation granted in favor of the inhabitants of Bremen, the claimants had deliberately planned, and so far executed a fraud, which, if now permitted to pass unpunished, would hereafter afford a precedent for practising, with success, on that lenity and forbearance which has ever characterized the execution of the offensive or defensive operations of the British government, where the interests of neutral nations has been materially concerned. Hence, should the court be induced to confirm the sentence appealed from, the claimants cannot possibly object that they are overtaken by any unforeseen calamity or hardship. They were aware of the consequences of en-
[* 49] gaging in a trade * violating the express letter of the order announcing the blockade; and the only hope they could entertain of succeeding, was in evading a search after the vessel had, by this artifice, passed the blockading squadron, on her way from Bracke, in the Weser, to Tonningen. It is intended to justify the conduct of these persons by attempting to prove, that the relaxation granted in consequence of Mr. Fox's letter to Mr. Thornton, dated the 9th of May, was applicable to the subsequent order for the blockade of all the ports from the Elbe to Brest, inclusive. This cannot be even inferred from the terms of either Mr. Fox's or Mr. Thornton's letter, in both which particular reference is made to the navigation of the Watten, and in the last, there is contained a detailed statement of the manner in which this indulgence is to be granted, and an enumeration of those vessels actually within the limitation or scope of the

The Sophia Elizabeth. 1 Acton.

relaxation. Throughout, there appears to be no understanding whatever that it was intended, after the notification of the 16th May, to permit these cities the liberty of foreign commerce ; and, least of all, can it be supposed that there was any intention on the part of government to permit any foreign commerce with the enemy's ports, when the order for a general blockade expressly prohibits the entrance or exit of any neutral vessels laden with the property of the enemy, or coming from or destined to the enemy's ports. The only relaxation that was ever intended, was comprised in permitting a communication between neutral ports. The sole remaining grounds of defence on which they can with any degree of confidence rely, is to prove, either that this was not a continuous voyage from Bremen by Tonningen to Algesiras, or that the vessel was not captured *until after the removal of the blockade. This vessel, it is [* 50] admitted, however, was captured on the 16th, whilst the blockade was raised on the 25th of September following ; and the circumstance of the cargo's accompanying the vessel to Tonningen, proves that it was a continuous voyage. It is true, that in the case of *The Maria Monsees*,¹ when a somewhat similar relaxation of the blockade of the Weser was proved to have taken place, the judge of the High Court of Admiralty extended the benefit of that order for relaxation to a foreign commerce by neutrals, though not absolutely within the letter of the admiralty order. But here there is no room for any latitude of construction ; the terms specifying the relaxation, are precise and defined, and the enemy's ports absolutely interdicted by the subsequent blockade. When so considerable an indulgence had been granted by the belligerent to neutrals, at their own urgent solicitation, the attempt to counteract the effect of a blockade, founded on the principle of political necessity, deserves exemplary punishment ; and when the claimants are detected in availing themselves of this indulgence, to make a colorable voyage from Tonningen to the enemy's port, with papers calculated to support this fraudulent intention, the court will be, no doubt, induced to confirm the sentence appealed from, and condemn the appellants in the captor's expenses.

Dallas and *Arnold*, for the appellants — In the court below, the claimants have been unable to procure that documentary evidence upon which they principally rested their hopes of establishing their claim. In searching amongst the papers of the secretary of state's office, two material documents were missing, *which [* 51]

¹ Robinson's Reports, vol. vi. part 2.

The Sophia Elizabeth. 1 Acton.

there is reason to apprehend might have made a considerable alteration in the merits of the case, had they been exhibited to the judge of that court. These have, since the sentence, been obtained, and are now amongst the papers of this cause. From the whole tenor of the official letters which passed respecting the relaxation of the blockade of the Weser, it must appear, that a reference is made to an intention of government, by some specific order, to apply a remedy to the grievance of which they complained. In the letter of Mr. Fox of the 9th of May, he assures Mr. Thornton, that such is his Majesty's wish; and that as soon as possible a new order shall be made out for that purpose, permitting him in the meantime to act as if this order had really been issued. Hence, it appears plainly there is a reference made to an order which then seems only to have existed in the minds of his Majesty's ministers, the extent of whose indulgence the appellants, amongst others, were no doubt encouraged to hope, from the prompt acquiescence with which their application had been received, would have been proportioned to the pressure and inconvenience of the grievance against which they had so successfully remonstrated. Upon the receipt of Mr. Fox's letter, Mr. Thornton proceeds to notify the gracious disposition of his Majesty, and *pro tempore*, or while this new order was framing, issues such orders to the naval commander on the station as he presumes may remove all ground of complaint, and anticipate the intention of government. Mr. Thornton's letter absolutely embraced the Ider amongst the rivers along the Watten to which the coasting trade was intended to be permitted, and also provides for the safe passage of all neutral

[* 52] vessels in ballast into and out of the Weser. * The cargo is carried out without being subjected to examination, under the protection of the first provision, and the vessel herself clears out for Tonningen under that of the second. The blockade of the Weser is thus strictly and literally understood, and complied with by the claimants, and so far there appears no necessity for the existence of the order, which Mr. Fox had promised, but which appears never to have been issued, for rendering these two voyages perfectly legal, even taking them as connected parts of the same transaction. The vessel and her cargo having arrived at Tonningen, there existed no prohibition to her sailing with it to any permitted port, provided the cargo itself was legal. She was, therefore, at liberty to prosecute a foreign commerce; and this, it must be admitted is the material question to which your lordships' attention should be principally directed. If there had been no relaxation, this conduct would undoubtedly amount to a breach of the blockade; but the moment the vessel was fairly out of the mouth of the Weser, she must be ad-

The Sophia Elizabeth. 1 Acton.

mitted to be as much at liberty, as to the manner of conducting her trade, as if she were in any free port in Europe. This consequence must follow from a consideration of the terms of Mr. Thornton's letter alone, which states the relaxation to be granted in the same manner as during the late blockade; and here it is necessary to refer to the case of *The Maria*,¹ seized in consequence of the former blockade, on a voyage from Varel, on the Jahde, to America. She had sailed in ballast from Bremen to Varel, under the relaxation of the blockade of the Weser; her cargo had been sent after in lighters, and transhipped at Varel, from which port she last cleared out. The circumstances of the voyage * were precisely similar, except [* 53] that the present vessel took in her cargo at Tonningen, and was destined to Spain. The circumstance of her destination is, however, perfectly immaterial; for if a permission to maintain a foreign commerce be contained in the order of relaxation, the vessel is altogether at liberty to proceed on any legalized voyage. The difference of shipping ports is also unimportant, Varel and Tonningen being equally out of the limits of the existing blockades. Under these circumstances of similarity, the decision of the judge of the High Court of Admiralty in that case must be considered peculiarly applicable to the present, especially when it is considered, that the relaxation in the present case is stated in Mr. Thornton's letter to be granted precisely in the same manner as in the case of the former blockade. In giving judgment, Sir W. Scott observed, that considering the nature of the communications which had passed between the accredited agent of the city of Bremen, Mr. Groning, and Lord Harrowby, then secretary of state, he was of opinion "that the passages cited to him in their natural sense applied to the external commerce of the city of Bremen. The object of the application is stated to be to prevent the remaining commerce from being transferred to the city of Embden. What commerce must we suppose to be meant? not merely the little commerce of Varel, but the remaining portion of the maritime commerce of Bremen." In commenting on those passages of Mr. Groning's letter to Lord Harrowby, complaining of the want of warehouses in Varel, the impracticability of a land passage from thence to Bremen, and the little danger there is to apprehend, that lighters passing along the Watten will resort to the territory occupied by *the [* 54] French, the learned judge states it to be his opinion, that, in the continuation of the blockade under the relaxation then procured by Mr. Groning, it was solely the intention of the British government,

¹ See page 50.

The Sophia Elizabeth. 1 Acton.

to prevent a direct communication with Bremen by ships from sea, and the touching of these small vessels on the parts of the coast occupied by the French. "These consequences," he continues, "they say could not happen; and that representation is material, I think, in fixing the interpretation of that admonition against abusing this relaxation, contained in the answer of the British government. The thing," he observes, "is asked in terms pointing to this kind of trade, and the answer appears to grant the permission in the terms of the petition. The claimants were, therefore, justifiable in the particular trade which they have been carrying on, and are, therefore entitled to restitution."¹ Should it be objected, that the relaxation by Lord Harrowby only provided that the trade of Bremen should be carried on by lighters navigating exclusively between the river Weser and Jahde, and not between the river Weser and Tonningen, it may be sufficient to direct your lordships' attention to a similar indulgence granted to small craft and lighters to coast along the Watten, between Hamburg and Tonningen in the following year, by an order of council. This order, in conjunction with the known spirit of liberality which actuates his Majesty's councils, relative to these neutral cities, no doubt encouraged these merchants to hope that the communication between the port of Bremen and Tonningen was intended to be included within this relaxation. And even were it to be your

lordships' opinion that this permission is not contained in [* 55] the relaxation, as it relates to the passage * of the Watten

generally, yet the case of the claimants cannot be materially affected by this circumstance, inasmuch as the permission to large vessels to proceed from the Weser in ballast, and to lighters to carry on the trade of Bremen over the Watten, amounts to a justification of the trade in which the vessel was engaged, since no restriction whatever was expressed or understood to be imposed by the blockaders on such large and small vessels, once they had passed the mouth of the blockaded river, except that restriction which had in the former order been imposed respecting the touching of lighters on those parts of the coast forcibly occupied by the enemy's troops. Hence, we are inclined to hope your lordships will permit the production of further proof as to such parts of the cargo as appears not sufficiently ascertained, and order restitution of the remainder.

JUDGMENT.

SIR W. GRANT. There can be no doubt, that either referring this

¹ Robinson's Reports, vol. 6.

The Sophia Elizabeth. 1 Acton.

voyage solely to the order of the 16th of April, or to that of the 16th of May, it would have been illegal. It remains to see, therefore, how far these orders are affected by the relaxation granted by Mr. Thornton's letter to the commander off the station. And here it is necessary to observe, that taking the former relaxation, during Lord Harrowby's secretaryship, as the measure of the general extent and principle of the present, it appears doubtful whether this particular communication between Bremen and Tonningen can be considered as included within the principle of relief extended by government, in permitting the free passage between Hamburg and Tonningen in 1805, and between Bremen and Varel in *1804. [*56] The different orders must be taken as applying specific relief to particular grievances experienced by the cities of Bremen and Hamburg. Mr. Thornton's letter, however, is decisive, and includes the free passage of four rivers, the Eyder, Elbe, Weser, and Jadhe, by lighters and small vessels. The blockade of the 16th of April had cut off all the trade of that river, except under the protection of the Danish flag, or proceeding to or coming from ports of the United Kingdom; this, therefore, required relaxation, and Mr. Fox's letter must have intended to effect that measure of relief, and pointed to some order then in contemplation; but which, perhaps, had not afterwards been deemed necessary. The order of the 16th of May followed, which appears to have made considerable provision for the protection of neutral trade, though announcing a more extensive blockade from the Elbe to Brest inclusive. By this, neutral ships with neutral cargoes, not including contraband of war, were permitted to carry on this trade in these ports, provided such vessels were not laden in, or destined to an enemy's port. Hence, it would be absurd to imagine that it was intended to let the smaller vessels out with cargoes destined for those interdicted ports. We are of opinion, that the export, therefore, to all the enemy's countries was absolutely interdicted by the express letter of the order of the 16th of May, announcing the general blockade. We, therefore, decree that the sentence of the court below be affirmed.

Upon the same principle, THE CHARLOTTA SOPHIA, Moller, master, and KLEIN JURGEN, Prott, master, both sailing in ballast from the Weser to *Tonningen, and there taking in cargoes [*57] which had accompanied them over the Watten, which were afterwards taken in the prosecution their voyage under charter-party to Algesiras, were condemned as prize to the captors, and the sen-

The Nancy. 1 Acton.

tences of the judge of the High Court of Admiralty, from whence these appeals had been interposed, confirmed.



THE NANCY, Hurd, master.

July 6, 1809.

Blockade of Martinique. The vessel contended to have committed a breach of the blockade, restored; the blockade squadron having gone on an expedition to Surinam, and left no adequate force behind to maintain the blockade.

THIS was a leading case of several appeals from Vice-Admiralty Courts in America and the West Indies, condemning the ships and cargoes for a breach of the blockade of the island of Martinique, in the year 1804.

The attestation of the master, who was the claimant of the vessel for himself and other American citizens, and of the cargo as the property of John Juhel, also of New York, in America, proved that he had, under charter-party, agreed to sail with a cargo from New York to the port of St. Pierre's, in Martinique, unless the same should be blockaded, and to bring from thence a return cargo of the produce of the island, for the sole account and risk of Juhel and other American citizens. That in case the island should be blockaded he had agreed to proceed to St. Thomas's, from whence he had orders to procure a return cargo from the proceeds of the outward. In pursuance of this agreement he arrived off Martinique on the 29th of March, [* 58] and finding no ships of war there, and not * being given to understand that there existed any blockade at that time, he, in consequence of the vessel's having sprung a leak, repaired to the port of Trinity in that island to refit, from whence he set sail, and arrived at that of St. Pierre's on the third of April. That while in the island he was informed the blockade had been removed, and the squadron had gone on an expedition to Trinidad. No vessel of war, whatever, had appeared off the island during his stay; nor was there any notice given of a blockade then existing. Having completed his cargo on the 15th, he sailed for New York, in which voyage he was captured and carried into Halifax, in Nova Scotia, when the vessel and cargo were condemned as prize. This statement was supported by the evidence of a passenger on board the vessel, by some of the crew, and by the tenor of a correspondence between

The Mentor. 1 Acton.

persons in France, New York, and Martinique, which proved that the blockade was at that time removed, or at least so far relaxed that no armed vessels had been seen off these ports during the period the vessel remained in the island.

For the captors it was contended — that although the blockading fleet had been despatched to Surinam, a force had been left off the island to continue the blockade, and apprise vessels of its existence. This appeared even by the correspondence exhibited by the claimants, one of the letters admitting, that a British fifty gun ship continued off the island, and was now and then seen by the inhabitants.

JUDGMENT.

The court held, that to constitute a blockade the intention to shut up the port should not only be generally made known to vessels navigating the seas in the vicinity, but that it was [* 59] the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures had been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without incurring any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade, which the correspondence mentioned had described to have been previously maintained by a number of vessels, and with such unparalleled rigor, that no vessel whatever had been able to enter the island during its continuance. Their lordships were therefore pleased to order that the ship should be restored, the proof of property being sufficient, but directed further proof as to the cargo claimed for the American citizens mentioned.

* THE MENTOR, Whitney, master.

[* 60]

July 6, 1809.

Condemnation for a breach of blockade.

In the Prize Court of Antigua this vessel had been claimed on behalf of his Majesty, by the Advocate-General, as a droit of admi-

The Mentor. 1 Acton.

rality. This had been rejected by the judge. Part of the adventure of the master, and those of the mate and mariners, had been ordered to be restored, and the ship and remainder of the cargo condemned for breaking the blockade of Martinique.

Stephen and *Swaby*, for the captors, proved, by the letters and despatches of the captain-general and colonial prefect, at Martinique, to the minister of the marine and colonies, at Paris, that the blockade had been most rigorously enforced, insomuch as to excite apprehension that the place would be compelled, by the deprivations experienced, to surrender to the British squadron; that this blockade continued at the time the vessel entered the port of Fort Royal; and that the master had even been apprised by his owners' letter of instruction, that the blockade of Martinique might still be continued. If this surmise should prove true, he was ordered to lie in St. Lucia, awaiting the probable surrender of the island to the British forces, in which case he was to repair thither as the most advantageous market. These instructions contained an assurance, that should the vessel be in Martinique at the time of the surrender, the terms of the late treaty between Great Britain and the United States [* 61] would protect her from detention. * From all these circumstances there was no reason to doubt that the blockade was known to the master, and that he had been induced to hazard the vessel, from the superior advantages to be derived from disposing of his cargo in the blockaded port.

Bowtler, for the claimant, contended, that the instructions of the owners were merely prospective and conditional, neither they nor the master at the time being aware of any blockade existing previous to the vessel's sailing; that he acted under this impression, and entered the island totally ignorant of the blockade. That there did exist no actual blockade at the time of the vessel's going into port, not a single vessel of war appearing in sight of the harbor, or in the neighboring seas through which he passed. That even by the tenor of the sentence of the Vice-Admiralty Court, restoring one part of the master's adventure and not the rest, it appeared the judge had not decided on the ground of any supposed breach of blockade; and that, even admitting the blockade to exist, it had not been known by the master so as to affect the case, until after he had disposed of his outward and purchased a return cargo, of which one third had actually been put on board.

The Robert. 1 Acton.

JUDGMENT.

The sentence of the court below, condemning ship and cargo, was confirmed.

*THE ROBERT, Thomas, master.

[*62]

July 6, 1809.

Condemnation of a neutral entering a port under a blockade *de facto*, although a justification attempted by pleading ignorance of its existence.

ADAMS and *Stephen*, for captors, proved this vessel, from the papers found on board, and those invoked into the cause from The Samuel, Evans, to have entered the port of St. Pierre on the 21st of May, which was then rigorously blockaded, and daily expected to surrender. During the whole time, whilst in the harbor, she could perceive a lugger belonging to the blockading squadron close in shore, which sometimes was supported by other vessels. The vessel had purposely entered in the night, to avoid the blockading force; and by the supplies which she, in conjunction with others, had introduced into the island, the garrison had been enabled to continue its defence, and prevent that surrender which had been the object of the blockade.

Dallas, for the claimant, stated, that the master had received only conditional instructions from his owners to enter this port, should the blockade be discontinued; should that not be the case, he was to make Trinidad or St. Lucia. Being informed, on the voyage by Captain Johnson, of The John and Jane, that the blockade had ceased, he entered the island in company with that vessel, and was totally unacquainted with the blockade, if any really existed. It had been decided in the leading case of The Nancy, Hurd, that a considerable force, sufficient in itself to intercept intercourse generally with the port, was necessary in order to constitute a blockade. Admitting that the solitary *lugger mentioned [*63] continually maintained its position near the harbor, it could not, therefore, be inferred there existed a blockade *de facto*, and consequently, on the principle laid down in the first of these cases, the captors should be condemned to restitution, with costs.

The Nancy. 1 Acton.

JUDGMENT.

The sentence of the Vice-Admiralty Court of Antigua, condemning the vessel, was affirmed.

NANCY, Woodberry, master.

July 6, 1809.

Under particular circumstances, a single vessel may be adequate to maintain the blockade of one port, and coöperate with other vessels, at the same time, in the blockade of another neighboring port.

THIS vessel had been restored in the Vice-Admiralty Court, in consequence of a deficiency of proof on the part of the captors, who were unable to obtain an affidavit of the blockade of the port of Trinity at the time of the capture.

Arnold and Gostling, for the owner. This vessel sailed from Trinity, on the 25th of May, about which period the correspondence of the governor of the island with the French minister of marine states that a frigate showed herself, from time to time, off the port of Trinity, with an intention to cut off supplies. The station of this vessel was sometimes off Trinity, and at others off another port, more than seven miles distant. Such an interruption to the trade of these ports could never be considered an actual blockade, and, therefore, the sentence of the court below, restoring the vessel, was perfectly justifiable.

Swabey and Stephen, for the captors. The sentence of the court below proceeded merely upon the ground of insufficient proof of the existence of the blockade. This is now altogether obviated; the invoked papers, with the affidavit formerly deficient, prove that it existed. The extensive range of the frigate mentioned was perfectly consistent with the objects she had in view, the blockade of Trinity, and a coöperation with the vessels on the other station. From the activity of the cruisers off this port, this vessel had twice been nearly cut out of the harbor, and her preservation was merely owing to a want of wind. From all these circumstances, the court will most probably be inclined to reverse the sentence of the Vice-Admiralty Court, and repair the injury the captors have sustained.

The Nancy. 1 Acton.

JUDGMENT.

SIR W. GRANT. As it appears the commander on that station considered the force employed completely adequate to the service required to be performed, we feel it necessary to rely on his judgment, and condemn the vessel as prize to the captors.

THE ACTRESS, Tinker, **THE FREEDOM**, Herrick, and **ADRIAN**, Dalcke, all clearing out from Martinique, in the month of February, whose cases were admitted to be within the principle upon which the sentences of the Vice-Admiralty Courts had been affirmed in the foregoing cases, from which they were * not [*65] distinguishable, were condemned as prize to the captors, for breach of blockade.

Chasing suspicious vessels, in the neighborhood of a blockaded port, no cessation of the blockade.

In the case of **THE EAGLE**, Marsan, Adams, for the claimants, contended, that notwithstanding she had entered the island on the 24th February, there was sufficient proof in the papers exhibited, that the blockade had been periodically interrupted by the prevalence of particular winds and the state of the tides; that several vessels had been permitted to go into the ports of the island under British passes, and several others had entered the island whilst the ships appointed to maintain the blockade had been absent, and employed in chasing vessels of a doubtful description. From these interruptions or relaxations of the blockade, the people of the island were uncertain when they were really invested, and hence he was induced to hope the sentence of condemnation would be reversed, as the master's statement that he was totally ignorant of the existence of the blockade was rendered extremely probable from the circumstances mentioned.

The court confirmed the sentence of the judge below, condemning the vessel.

[* 66]

* MERCURY, Speck, master.

July 6, 1809.

Further proof of property admitted, as to a ship and cargo claimed for a neutral merchant, although both appear to have been purchased in the enemy's colony by his asserted resident agent, without particular instructions to make the purchase, but acting under a general permission given him to originate speculations for account of the neutral merchant.

A QUESTION arose as to the property of the ship and cargo, both of which were claimed for Mr. Juhel, of New York, an American citizen.

His Majesty's Advocate and *Stephen*, for the captors. The circumstances under which this vessel is described to come into the possession of Juhel are of such a nature as to excite in themselves a strong suspicion that he is not really the proprietor. This vessel, during the blockade of Martinique, lay in the harbor of Fort Royal, and was purchased by a Mr. Cock, who assumes the character of commercial agent for Juhel, in New York. This purchase is asserted by Cock to have been made for the sole account of Mr. Juhel, who, in his attestation, admits Cock to have unlimited powers given him to originate speculations on his account; and also states that he has considerable funds in the island, in debts or otherwise, by which, and also by bills of his acceptance, this purchase was made and the vessel laden with colonial produce. A suspicion naturally arises, that this purchase for another's account is merely collusive, and that the scheme has been resorted to in order to give a color to the transaction, and conceal the real owner by this nominal transfer. This is supported by Juhel's silence respecting the purchase of this particular vessel. There is no commission specifically given to Cock, but he proceeds in the whole affair like a person consulting solely his own interest and wishes, lading her with such goods as suit his own purpose, and requiring no sanction from Juhel as to the

[* 67] * asserted purchase of the vessel or lading. In some letters, it is true, he mentions the purchase of both; but it must appear strange that the intimation is not given until the design is already completed. Hence it is fair to infer that he incurred no responsibility to Juhel, or else he would have been more anxious to acquaint him of his intention in time to prevent that responsibility, should the design be disapproved. The whole nature of Juhel's

The Mercury. 1 Acton.

trade to the island tends to show there is a common concern and joint interest with Cock, or others in the island. They both admit unlimited consignments are constantly making, between the one as agent, and the other as merchant. This is in direct violation of the established usage of merchants, and must have its due influence on your lordships' decision. As soon as the blockade was supposed to have ceased, the vessel departed for New York. From this circumstance, and the conduct of Juhel in the case of *The Nancy*, Hurd, it appears his trade to that island was carried on with an intention to defeat the blockade. This must necessarily affect his neutral character, and point out a connection with the enemy. This connection has been happily developed by a paper invoked into this cause from the registrar's office at Halifax, which purports to be a power of attorney from John Juhel and Nicholas de Longuemare, to Messrs. Foresight & Smith, of Halifax, empowering them to receive the proceeds of the ship *Emanuel*'s cargo as the joint property of Juhel and Longuemare, and is dated the 9th of March, 1804. This Mr. Longuemare is a Frenchman, and is soon after discovered to be residing in France, probably conducting the concerns of the firm in that country. There has been an attempt made to show that this connection was broken by a dissolution of partnership, which was notified in *The New York Mercantile Advertiser*, on the 22d of October, 1803. That the connection was not absolutely dissolved is plain, from the date of the power of attorney being much later, namely, March, 1804. There were many reasons, no doubt, to consent to a nominal dissolution of partnership; some, probably, prospective of Longuemare's future residence in France, and others originating in the hope of being able, by this feint, to neutralize the property of the enemy, and defraud our belligerent rights. In the case of *The Nancy*,¹ Hurd, there appears also a claim for property by Mr. Juhel, which it is almost unnecessary to distinguish from the present claim. The same scheme seems to pervade all mercantile transactions in his name. His intentions evidently are to obviate the blockade of the island, and to cover enemy's property by false papers and documents of neutrality. This last intention, it appears, proved fatal to the interest of an admitted neutral, in the case of *The Betsey*, Furlong; and, upon this principle, it may not be too presumptuous to hope your lordships will condemn the property in both *The Mercury* and *Nancy*.

¹ See page 57.

The Diomede. 1 Acton.

Adams, for the claimants. The nature of the papers produced in this cause will naturally affect the interests of Mr. Juhel in some degree, though by no means to the extent contended for by the captors, unless we are able to explain them to the satisfaction of the court. This the appellants hope will be done most satisfactorily, should there be permission given to introduce further proof. This indulgence they are entitled to expect, from the fair and [*69] explicit nature * of the ship's papers themselves, and the strong and absolute averments of the parties. The power of attorney mentioned will be proved to have reference solely to debts incurred before the dissolution of partnership; and Mr. Longuemare will also be proved to be this moment residing in London, transacting business on his sole account.

JUDGMENT.

The court ordered further proof to be introduced.

DIOMEDE.¹

July 8, 1809.

Question as to the general principle of distribution of the flag-eighth in captures asserted to be made conjointly by different flag-officers, either as coöperating personally, constructively, by the ships under their command, or finally, by the capture being made within the limits of their station.

In this case two appeals were prosecuted from the decision of the High Court of Admiralty of Great Britain, which must be considered of uncommon interest, as well from the number of illustrious naval commanders, whose claims were most elaborately and patiently investigated, as from the important nature of the principles of law adopted in the distribution of prize.

The Diomede and Imperial formed part of a squadron of French ships of war, which was defeated and destroyed by a squadron of his Majesty's ships, under the command of Vice-Admiral Sir John Thomas Duckworth, Knight of the Bath, off St. Domingo, in the memorable engagement of the 6th of February, 1806. Proceedings commencing

¹ [For cases as to the flag share, see *The Doloras*, 2 Dod. 413, note.]

The Diomede. 1 Acton.

in the High Court of Admiralty, of England, touching the adjudication of the *ship Diomede, and a question arising [* 70] as to the distribution of the flag-eighth of the said prizes, the judge (Sir. W. Scott) decided in favor of the following claimants: Vice-Admiral Lord Collingwood, as commander-in-chief in the Mediterranean, (from which station Sir John Thomas Duckworth, in company with Rear-Admiral Louis, had set sail in quest of the enemy, with a part of the fleet under the command of his lordship,) Vice-Admiral Knight, and Rear-Admiral Lord Northesk, the present respondents; and that they, together with Vice-Admiral Sir John T. Duckworth, Rear-Admiral Louis, and rear-admiral the honorable Sir Alexander Forrester Cochrane, were entitled to share in the flag-eighth of the prize; Admirals Knight, Lord Northesk, Duckworth, and Louis, as junior flag-officers under Admiral Lord Collingwood, the commander-in-chief on the Mediterranean station, from whence the armament set sail; and Sir Alexander F. Cochrane, as junior flag-officer on a West India station, taken under the command of Sir J. Duckworth, as his superior officer, and also assisting in the capture. But pronounced against the claim of Vice-Admiral Dacres, within the limits of whose station the capture had been made, and in which capture Admiral Sir J. T. Duckworth had availed himself of the assistance of The Magicienne, one of the ships of war then under the command of the said Admiral Dacres, on the Jamaica station.

Leach, for the respondents, Lords Collingwood, Northesk, and Admiral Knight—There has never been a case submitted to your lordships' decision which equally involved so many considerations of the utmost weight and the most extreme delicacy, both with respect to the regulation of the respective interests, and the [* 71] due subordination of the different officers of his Majesty's navy, as that which I have now the honor to open on the part of the respondents. As the arguments to be submitted on this part of the case are partly inferential from facts generally admitted, partly founded on the positive and express proclamation of his Majesty,¹ regulating the distribution of prize during the present hostilities, and partly deducible from the custom and usage of our navy for ages, it will first be necessary to take a view of the facts and leading features of the case. On the death of Lord Nelson the command of the Mediterranean fleet fell necessarily upon Lord Collingwood, having, amongst others, Vice-Admiral Knight and Lord Northesk, as junior flag-officers

¹ See Appendix.

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under him. On the 19th November, 1805, he issued an order to Sir John Thomas Duckworth, taking him under his command, and another order enjoining him to take under his orders certain ships of the line and other smaller vessels, for the purpose of maintaining the blockade of the ports of Cadiz and San Lucar, in which service he was to regulate himself by the tenor of the instructions he had received in a letter of a former date. From the time of issuing these orders Sir John T. Duckworth continued under his lordship's commands, receiving and obeying his instructions from time to time. Rear-Admiral Louis, whom he succeeded on the station, repaireed to the commander-in-chief, in pursuance of orders to that effect; but previous to joining his lordship, he received important intelligence respecting a French force which had appeared in those seas, in consequence of which he conceived it his duty to acquaint Sir

[* 72] *John Duckworth with this intelligence, and returned for that purpose. On the 29th of November Sir John Duckworth wrote to his lordship the following letter:—“Rear-Admiral Louis, who separated from me with The Spencer on the night of the 27th, in execution of your orders, has just joined me again, bringing in The Agamemnon, (which I had placed with The Naiad in shore off Cadiz,) in consequence of the accompanying intelligence he had received from her captain, Sir Edward Berry; and as there is nothing in the port of Cadiz in any state of readiness for sea, except three or four frigates, I shall, in the anxious hope of anticipating your wishes, proceed, as soon as I can get hold of one of the sloops, or The Naiad, to apprise you of my intentions, with a press of sail off the Salvages, and from thence, if not fortunate enough to fall in with the enemy, to return by Vigo to my present situation; and though I could have wished to have had two or three frigates, I will endeavor to do without them.”

He also, on the 30th November, wrote a letter to William Marsden, Esq., secretary of the admiralty, from which the following is an extract:—“As it is possible a conveyance may be met with from here to England, before Vice-Admiral Collingwood may be apprised of my proceedings, I am to desire you will inform the Lords Commissioners of the Admiralty, that in consequence of orders from that commander-in-chief, received the 26th instant, I detached Rear-Admiral Louis, in The Canopus, with The Spencer on the 27th, to join him, but they returned to me yesterday afternoon with the accompanying intelligence.” Lord Collingwood having also received information of the French squadron mentioned in such intel-

[* 73] ligence * on the 1st of December, 1805, issued the following order to Sir John Thomas Duckworth:—“Whereas I have received information that a squadron of enemy's ships of war are

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cruising between the islands of Madeira and Teneriffe, for the purpose of intercepting the convoys and trade going abroad, and that on the 20th ultimo, they fell in with his Majesty's sloop The Lark, and are supposed to have taken some of her convoy, a copy of which intelligence I inclose; you are hereby required and directed to take the ships named herein under your orders, and proceed without loss of time in quest of the enemy's said squadron, off the Salvages, and, on falling in with them, use your best endeavors to take or destroy them. As I think it probable that the island of Teneriffe may be the rendezvous of the above-mentioned squadron, in order to obtain their supplies of water, &c., you will proceed with the ships under your orders, to the southward of the Salvages, between them and Teneriffe, in order to cut off the French squadron from this their supposed rendezvous for obtaining supplies. Having arrived there, and not meeting the enemy's squadron, you are to obtain the best information you may be able respecting them, by vessels boarded or otherwise, and pursue them as long as there is a fair probability of coming up with them; but in case of your not receiving such intelligence as may lead you to the enemy, you are to return with all possible expedition to the rendezvous off Cadiz, where, making up the number of six ships of the line, two frigates, and two sloops, you are to continue the blockade of that port, agreeably to my former orders of date the 28th ultimo, sending Rear-Admiral Louis with the remainder to Gibraltar Bay, to *complete their water and provisions, [* 74] which being done, they are to join me on the rendezvous they will receive from Rear-Admiral Knight. You are to transmit me a journal of your proceedings, by the same conveyance, or sooner if opportunity offers." This order was sent by his Majesty's ship Tigre, but that ship not meeting with Sir John Thomas Duckworth at the rendezvous appointed, the same was not received by him. On the 14th January, 1806, Sir John Thomas Duckworth, being then at Barbadoes, wrote and sent a letter to Lord Collingwood, from which the following is an extract:—"In consequence of a proposal made to release some prisoners, I left The Acasta, which had joined me that morning, to receive them; but alas, this great civility of the governor produced only two old men, one a Swede. Thus I was disappointed in my expectations; but I derive great pleasure from your lordship's kind letter, and what Captain Dunn acquainted me, as it convinced me the step I had taken, in going in pursuit of the enemy, had met with your approbation; and as it was evident that they had stood to the N. E., I made sail for the Salvages, for the purpose of joining The Neptune, Tigre, and frigates your lordship mentioned having detached; but the wind being now unfortunately

The Diomedes. 1 Acton.

very fresh from the northward, I did not get past for five days, in which time I saw none of the ships alluded to, and, consequently, made use of all my endeavors to return by Cape Finisterre." On the 3d of February following, Sir John Thomas Duckworth, being off the island of St. Thomas, again sent a letter to Lord Collingwood, in

which he states, that "finding by the accounts from thence, [* 75] as also the various parts of the command, that the * account

of the force alluded to, brought by The Pheasant, had neither been seen nor heard of, I determined on leaving St. Christopher's this day, to return to my station under your lordship, when, on the first instant, I received the interesting intelligence herewith transmitted, and from the character of the party from whom it came, Rear-Admiral Cochran, gave it full credit for authenticity ; and in consequence, I directly weighed with the squadron that I left Cadiz with, except The Powerful, which, I already mentioned, I had detached for India, also increased by The Northumberland and Atlas ; and though I was by no means disposed to remove Rear-Admiral Cochrane from his command, the delay that must have been produced before a frigate could be sent for to take him on board, and his strong objections to the removal, induced me to take him with me ; yet, from the particularity of the intelligence, with the names of the ships, &c., great doubts are raised in my mind at the French being so communicative, though, as time, and other parts of it, correspond with information before received, I feel nothing could justify my leaving the country in that state of doubt, especially as the Lords Commissioners of the Admiralty are aware of your lordship's reduction of force by my being in these seas." On the 6th of February, Sir John Thomas Duckworth fell in with the squadron of French ships of which he had gone in pursuit, as stated in the letters and orders before recited, off the island of St. Domingo, and, after a severe action, captured and destroyed five line of battle ships, of which the ships mentioned in the proceedings were two. On the 7th of February, the day after the

[* 76] action, Sir John Thomas Duckworth sent * a letter to William Marsden, Esq., giving an account thereof, beginning thus : "As I feel it highly momentous for his Majesty's service that the Lords Commissioners of the Admiralty should have the earliest information of the squadron under my command, and as I have no other vessel than The King's Fisher that I feel justified in despatching, I hope neither their lordship's, nor Vice-Admiral Lord Collingwood, will deem me defective in my duty towards his lordship, by addressing you on the happy event of yesterday." And on the same day he also sent a letter to Lord Collingwood, as his commander-in-chief, giving him likewise an account of the action ; and also, on the

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next day, another letter to Lord Collingwood, as follows : " Inclosed herewith I have the honor of transmitting, for your lordship's information, a list of the killed and wounded, with intelligence since drawn from the French prisoners ; and I am this moment sending to set fire to L'Imperial and Diomede, when the business will be complete, on which I most heartily congratulate your lordship." On the 19th of April following, William Marsden, Esq., wrote and sent the following letter to Lord Collingwood, namely : " I have the commands of my Lords Commissioners of the Admiralty, to signify their directions to your lordship, to give Vice-Admiral Sir John Duckworth leave to return home, in such ship as your lordship may have intended to send to England, on account of her want of repair, provided the vice-admiral should wish to avail himself of this permission." On the 30th of April, Sir John Thomas Duckworth, in his Majesty's ship Superb, and in company with his Majesty's ship Acasta, from the West Indies, rejoined *the fleet under the command of Lord [* 77] Collingwood, and thereupon delivered to Lord Collingwood, as his commander-in-chief, a journal of his proceedings during his absence. The following is an extract of an entry therein on the 30th April : " At ten, joined the squadron under Vice-Admiral Lord Collingwood, the commander-in-chief."

On a review, therefore, of the facts, it must be evident, that during the enterprise, and even at the time when he rejoined the fleet, there was not a doubt on his mind that he acted under the orders and subject to the command of his chief, Lord Collingwood. That this was also the opinion of his lordship, may be easily inferred, as well from the communications made by him to Sir John Duckworth, wherein he uniformly mentions this enterprise as growing out of the particular service to which he had been appointed by his command, as from the manner in which he was received by him on his return to the fleet. No expostulation takes place, no objection is made to his conduct, nor any intimation given by his commander that he had exceeded his orders. He delivers to his lordship a journal of his proceedings, and the conduct of both the one and the other most clearly demonstrates, that they entertain the fullest conviction that this enterprise had been begun and conducted throughout under a mutual responsibility for its failure or success, on the part of the vice-admiral to the commander-in-chief, and on his part to the board of admiralty and the country. This, however, does not rest solely on their mutual conviction, it is most distinctly proved by their mutual acts. His lordship appoints the vice-admiral to the station, furnishes [* 78] him with instructions, and also points out to him the necessity there exists, on such a service, to exercise a due discretion in all

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instances which may not be provided for by the letter of his instructions. This, no doubt, was to extend, in the first instance, to all accidental occurrences which might be supposed to have a reference to, or an effect upon, the service in which he was then peculiarly engaged, and in a more extended sense may be supposed to embrace all possible cases wherein, without detriment to the particular service to which he had been appointed, the general interest of this country might be promoted, or the designs of the enemy frustrated. That such was the acceptation Sir John Duckworth gave to this permission of a general discretion, is evident from the precaution he took in examining and ascertaining what proportion of the enemy's force was at that time in a state of preparation for sea. This, he found only consisted of a few frigates, and justly concluding these frigates would not venture out without the support of some vessels of the line, he took this opportunity of pursuing the enemy's squadron, in consequence of the advice he received from Admiral Louis, who, it should be observed, was then acting as an inferior officer under the command of his lordship. Thus, even in this first stage of the undertaking, he appears acting in consequence of advice received from an officer under the orders of the commander-in-chief; but it is almost equally certain, that had he received this information from any other source, his conduct would have been precisely the same. To prevent the escape of the enemy's fleet to that portion of the globe where it might most

materially injure our interests, was an obligation paramount

[* 79] to all others. Aware, therefore, * of the extreme importance of intercepting them, he commences the pursuit, even under disadvantageous circumstances, and, eager to relieve the anxiety of his commander and the board of admiralty, occasioned by this escape of the enemy's fleet out of port, he despatches letters, acquainting both of his having set out in pursuit. His lordship, previous to the receipt of the letter, becomes acquainted with the escape of the French fleet, and issues orders to Sir John Duckworth to proceed off the Salvages, in pursuit, and to continue it so long as there might be any probability of overtaking them, in which, should he fail, he is ordered to return to his original station. This order did not reach him, in consequence of his having anticipated the wishes of his lordship, acting in conformity with that discretionary power, the exercise of which had been sanctioned by his commander's orders, expressly and uniformly maintained by the custom and usage of all naval officers from time immemorial. In the exercise of this discretion he arrives, after pursuing the enemy's fleet for a considerable time, in the island of Barbadoes, from whence he acknowledges the receipt of a letter from his lordship, acquaints him with the reason of his continuing the pur-

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suit to the West Indies, with other particulars of his voyage, as is usual in similar cases of despatches from an inferior flag-officer to his superior. In the same manner he writes from the island of St. Thomas, acquainting his lordship with the existence of an enemy's squadron in those seas, in pursuit of which he felt it his duty immediately to proceed, taking with him Sir Alexander Cochrane, and the vessels under his command. In this letter, he explicitly avows his conviction, that nothing could justify * his leaving these [* 80] islands exposed to the attacks of a force far superior to any the British commanders in those seas could collect. After the engagement, he acquaints both his commander-in-chief and the Lords Commissioners of the Admiralty with the agreeable result, and shortly after transmits to his lordship an account of the killed and wounded, with other particulars of the engagement. It may, perhaps, be contended, that in acquainting the admiralty first with his intentions, and finally with his success, he acted under a consciousness that he had already exceeded his instructions, by deserting the blockade, and that the whole responsibility of the transaction would necessarily fall upon himself alone, having, as it were, taken himself from under the command of Lord Collingwood, by disobedience of his orders. This is not discoverable from any expressions either on the part of Sir John Duckworth or his lordship; the anxiety of both for the issue of the contest, proves the reverse; and this anxiety, which he presumed equally affected the Lords of the Admiralty, was alone a sufficient inducement with him to make them acquainted as soon as possible with the line of conduct he proposed to adopt. The usual way certainly was to acquaint the commander on the station, who communicated the intelligence to their lordships. Here there, however, existed various cogent reasons to communicate directly with the admiralty. In leaving the blockade, he was anxious, as he states in his letter to Lord Collingwood, to acquaint them of the circumstance as soon as possible, that they might send out a force to recommence the blockade, if it should be considered necessary. In acquainting them with the victory, he sought to relieve their minds of an anxiety which was not

* confined to them alone, but had pervaded all ranks of people in this country. His object, in both instances, was to prevent inconvenience to the service, and anxiety to the nation, but by no means to cover or shield himself from the probable consequence of a breach of orders; and it could not, therefore, be fairly inferred from hence, that he acted under a conviction he was solely accountable for the success or failure of this voluntary pursuit, to their lordships, and to the country at large.

Having said so much on the facts of the case, as well as the gene-

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ral usage of the service, I shall next refer your lordships to the express letter of law on the subject, which is most explicitly laid down in the proclamation of his Majesty, regulating the distribution of prizes during the present hostilities, and dated the 7th of July, 1803. The preamble, if it may be so called, of that part regulating the distribution of the flag-eighth, provides, that those flag-officers alone shall be entitled to share in the prize who have actually been on board at the time of capture, or have been directing or assisting therein. This general provision, connected with the seventh article of these regulations, includes the whole of the argument upon which the respondent's case is expected to be supported. The seventh article ordains, that an inferior flag-officer quitting a station, (except when detached by orders from his commander-in-chief out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed,) shall have no share in prizes taken by the ships and vessels remaining on the station after he shall have passed the limits thereof; and in like manner the flag-officers remaining on

[* 82] the station shall have no share of the * prizes taken by such inferior flag-officer, or by the ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid. Upon this article the claim of the respondents must rest, and upon that particular part of it which states the exception to the general principle laid down in the body of the article. It is not intended to deny, that had he quitted the station without orders expressed or implied, he would then have subjected himself to censure, and, perhaps, have thereby excluded his chief, whose authority he had thrown off, from participating in any prizes made; but the right of participating is intended to be maintained by the fact of his having quitted the station consistently with, and in strict conformity to, the general orders he had received on being appointed to the station; and on the commander-in-chief's having issued particular orders, to draw off his force from the blockade, and proceed to chase the enemy, which orders he would have received, had he not already acted upon that discretion vested in him by virtue of his appointment to the command of that important station. Here, then, it is perceivable, that Sir John Duckworth's conduct is not only in conformity with the general orders he had received, granting him a discretionary power, but also in strict conformity to the particular orders which it had very naturally been expected would have been issued on the occasion, and had, therefore, been anticipated with so much subsequent advantage to the country. The article alluded to, is in itself sufficient to maintain the right contended for, were it not supported and corroborated by the fundamental principle upon

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which the distribution of the flag-eighth is founded in the commencement of *this part of the proclamation, limiting [* 83] the distribution solely to the flag or flag-officers who shall actually be on board at the capture, or directing or assisting therein. Sir John Duckworth and Sir Alexander Cochrane are admitted to share on the first principle recognized. The terms directing or assisting therein, are necessarily inferred to include the commander-in-chief on that station from whence Sir John Duckworth proceeded. These terms are not meant to imply that in all engagements fought, or captures made, on a station, that the commander-in-chief of that station shall arrange the disposition of the forces employed in the affair, nor even that he should be at all acquainted with the state of the combatants or captors, further than the usual naval returns at stated periods might afford him general information. It is sufficient that he has once taken the respective squadrons on the various requisite services under his command by general orders, to infer, that from the moment of his issuing those orders he is constructively, not actually, aiding and assisting in all those enterprises, combats, or captures, which may be made by the forces under his command. This constructive assistance is also considered to be extended to all such flag-officer or others, as he may feel it his duty to despatch out of the station upon any requisite service. Upon this interpretation of the proclamation mentioned, and the known usage of his Majesty's navy, the claim of his lordship to the flag-eighth is founded. His claim being once established, there can be no doubt that the remaining respondents, Vice-Admiral Knight and Earl Northesk, inferior flag-officers on that station, are equally entitled to share in their respective *proportions. Sir Alexander Cochrane can only [* 84] be entitled to share as a junior flag-officer under Sir John Duckworth and Lord Collingwood, having been taken under the command of Sir J. Duckworth during the voyage ; and Vice-Admiral Dacres, within whose station the capture was made, is excluded from any share whatever therein, inasmuch as he was not present at the time of the capture ; and The Magicienne, though originally a part of his squadron, had been assumed by Sir John Duckworth, as his superior officer, and actually formed a part of his squadron at the moment of the engagement. From these weighty considerations, which have already proved successful in the High Court of Admiralty, the respondents confidently hope your decision will confirm the sentence of the court below.

Arnold, also for the respondents. In addition to the arguments already urged in support of the decree of the High Court of Admiralty,

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it is my duty to draw your lordship's attention to the distinctions made both by the usage of the service and the proclamation mentioned, in favor of the superior officers of the navy, in cases of joint capture. The inferior officers are absolutely required to be personally aiding and assisting at the time of capture, to entitle them to any share in the prizes made ; the superior officer is solely required to be generally aiding and assisting. This may mean either personal or constructive assistance : the last forms the leading feature of the respondent's case. The latitude given in this sense to the terms aiding and assisting, is very extensive. To imply constructive assistance, it is not neces-

[* 85] sary that the flag-officer * should be actually present or near at the time ; that the inferior officer should be provided with express orders as to the particular service in which he was employed when the capture was made, or that the capture should even be made within the limits of his station. No : it is sufficient that the superior flag-officer should have taken the inferior under his orders generally, and that under these general orders he should continue to act during the time in which the capture was made. Thus, all possible enterprises arising out of, or consistent with, the general service to which the inferior officer had been appointed, still are included within the general principle of constructive assistance. There are but two modes recognized by which it is possible an officer can quit his station ; one by orders from his superior or the admiralty, another by quitting his station in direct violation of orders, or, as it is termed, in delinquency. Had Sir John Duckworth abandoned his station in delinquency, it would have been the imperative duty of Lord Collingwood, whatever might have been the result, to have made a representation of his misconduct to the Lords of the Admiralty, and an investigation of his conduct must have taken place. This has not occurred ; the inference, therefore, is, that the enterprise in which Sir John Duckworth engaged, was consistent with, and sanctioned by, the general instructions he had received. No orders appear to have been issued by the Lords of the Admiralty, in which case the eighth article of the proclamation would have been sufficient to defeat the claim of the respondents in the court below, which expressly provides against any

such participation of prize captured. It must, therefore, follow as a consequence, that Sir John Duckworth's *enterprise can solely be concluded to have been commenced and continued under the orders issued by Lord Collingwood at the time of his appointments to the Mediterranean station. The principle upon which his lordship's claim as joint captor is founded, arises from the responsibility to which the superior officer is subject for the exertions and conduct of those under his command, as applicable to him in

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common with all superior officers, and is recognized in almost every one of the several articles of that part of the proclamation relating to the distribution of the prize flag-eighth. Thus, on a flag-officer's arriving on a station to supersede another, he immediately derives, under the third article, a right to all prizes taken by the squadron to which he has been appointed, as soon as he arrives within the limits of the station. This may be considered a more remarkable instance of the extension of the principle of constructive assistance ; the only claim he can have to share being derived from the assistance or direction given by his predecessor in command, but which, constructively, is attributed to him in order to entitle him to his due proportion of the flag-eighth. This principle, so clearly demonstrated, comprises the whole case of Lord Collingwood. Sir John Duckworth considers himself solely accountable to his lordship for his conduct, and therefore informs him of his intentions, apologizing at the same time for irregularly acquainting the Lords of the Admiralty by a more direct communication. These intentions were sanctioned by his lordship's acquiescence, (if, indeed, they had needed any,) even upon the principle of his lordship's general orders to the vice-admiral ; and this approval on the part of his lordship, of an act done without his immediate orders, *may be considered tantamount to [* 87] such orders. Nor can it materially alter the case, should it be objected, that the vessels concerning which his lordship issued those orders actually escaped Sir John Duckworth's pursuit, and those which were afterwards captured belonged to another squadron. The principle is the same, namely, that the vice-admiral was borne out in this exercise of a due discretion by the general orders issued, which equally included the second squadron as the first, and that in each and every part of the enterprise the commander-in-chief was constructively and impliedly directing and assisting in the capture ; neither can it be doubted, that had there been any failure in this enterprise, his lordship would have incurred a heavy responsibility to his country for not having at any time signified his dissatisfaction with the undertaking, or exerting the power vested in him by recalling him to the station, which the frequent means he possessed of communication with Sir John Duckworth would have enabled him repeatedly to have done with effect.

Addams, for Vice-Admiral Dacres. The principal difficulty in the examination of the merits of this case arises from the high authority of the judge who has already decided in favor of the respondents. Every possible deference should be, and undoubtedly is now, paid to the decisions which have been of late years made in the High Court of Admiralty. Yet in this court it cannot be considered in the least

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disrespectful to that authority, to suggest the necessity of excluding any other considerations than the naked facts of the case, the known law on the subject, in conjunction with the general principle [*88] of equity, upon which a case * is usually decided on its introduction to your lordship's bar from any of the numerous other courts within your extensive jurisdiction. It will be altogether unnecessary in this instance to direct your lordship's attention to any number of topics in support of the claim of Admiral Dacres. The legal principle which must decide upon his claim may be wrought out from a document plainly written and simply worded, throughout which it is impossible not to perceive there is but one spirit uniformly actuating and influencing each provision. This proclamation, which has already been quoted repeatedly, contains in the seventh clause, relative to the distribution of the flag-eighth, the just and rational principle which alone can fairly be applicable to the question at issue, and which, as it was considered to contain matter of the last importance and the most extreme delicacy in ascertaining the reciprocal rights of the inferior and superior flag-officers of his Majesty's navy, seems to have been so explicitly worded, that no possible cavil can be raised as to the meaning and intention of this part of the proclamation. This article contains a general rule, with an exception, upon which it has been attempted to prove the respondents are entitled to claim. To support such an assertion recourse is had to every thing but the plain letter of the proclamation. The words, "leaving a station," may be extremely easily understood, without referring to any supposed custom or practice of the service, which, even taking it to be such as it is contended, seems by no means to be uniform in its operation or perfectly ascertained. The whole of the judgment of Sir W. Scott, in the case of St. Anne,¹ (though deciding in favor of the admiral's claim when absent from [*89] *the station, from which, however, he had only departed *pro tempore*, reserving to himself the power of returning when his health should be reestablished,) displays a strong disinclination to associate with the plain words of the admiral's instructions to his successor, any of the usual motives, customs, or rules of the service, which could not possibly have any thing to do with them. Our case also rests upon the plain meaning of an admitted document:— we are content that the words, "quitting a station," should be taken according to their obvious meaning; the respondents require that they should be taken in the more complex sense of "quitting with orders." Hence they contend they are entitled to share within the exception mentioned, reserving to the

¹ C. Robinson's Reports, vol. iii. p. 70.

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superior officer a right to share when the inferior flag-officer is detached by orders, with injunctions to return after having performed such and such services pointed out. To contend for this construction, making this departure a departure by orders, is drawing into the case matter *aliunde*, and is by no means justifiable in this instance. If it be inferred from the decision of the judge of the High Court of Admiralty, that he was of opinion quitting is quitting with orders, this opinion is in direct opposition to that of Lord Ellenborough in a similar case. Whilst they constructively uphold the doctrine that Sir John Duckworth could not quit without orders, we prove from facts that he did quit without any. Had he quitted his station without orders, they contended it would have been a desertion ; this inference we also admit with them to be fair. There can be no doubt it was a desertion until approved, and such, it must be inferred, Sir John Duckworth thought it from the extreme anxiety he displayed to obtain some notification of his lordship's [* 90] approbation of this enterprise, and the apologies he so constantly makes for his conduct. Admitting, however, it was a desertion, it cannot be inferred from hence that the respondents would derive any right to the prizes taken from this circumstance, since Lord Collingwood can only derive as commanding Sir John Duckworth. Nor will the court permit the subsequent approval of the enterprise to make so material a change in the respective civil rights of the parties, as to give this approval, on the part of an interested person, the force of an investment of a right to a material benefit. The next consequence of such an admission would be, that the commander-in-chief was subject not to an actual but an optional responsibility, having it in his power to reserve his approbation of the enterprise undertaken until time should enable him to ascertain whether it would be consistent with his interest to assume, by such an approval, this responsibility. The correspondence, upon which so much has been said, can be but of very little weight in leading your lordships to a decision on this point. The letters only substantiate Sir John Duckworth's natural unwillingness to remove without orders from his station, and although he had conceived he was acting under the orders of his chief, it does not follow, *ex consequentia*, that he really was so. His opinion would not overturn the fact. But it does not appear that he thought so; for he is discovered providing against the possible consequences of his quitting without orders, by writing to the admiralty on going out upon the enterprise, and also after the capture. This proceeding *per saltum* is totally contrary to the custom of the navy, and must, therefore, be supposed to be founded * in very serious reasons, probably the appre- [* 91]

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hensions of the vice-admiral that his conduct might not receive the sanction of the commander-in-chief. His anxiety, therefore, to obtain the sanction of their lordships induces him to communicate with them, and even to communicate to them the hopes he entertained, and the plan upon which he intended to proceed in future, expressly stating, that he will ultimately be guided by events. If it be admitted that he was *prima facie* a deserter from his appointed station, he could not be relieved by the approbation of Lord Collingwood, but by the determination of a court-martial. His letters to his commander and their lordships show, no doubt, an anxiety for his and their good opinion, and takes place of the *prima facie* delinquency. But can it be admitted that it is competent for his lordship thus to make, by his tacit subsequent approval, a defeasance of the offence, and an absolute accruing of a right to share in the captures? A case strongly in point is found in the sixth volume of East Reports, page 220, *Harvey v. Cooke*. Captain Milne, under orders issued by Admiral Harvey, was directed to lie off Demarara for the specific purpose of intercepting the trade of the enemy. He soon after sailed to St. Kitts, and being anxiously solicited by the merchants in that colony to convoy the British vessels then ready for Europe, and in danger of losing the favorable opportunities of wind and season which then prevailed, he, without any orders from his superior, undertook the task of convoying the trade vessels to England. On his passage he came up with and captured a vessel belonging to the enemy. A question arose whether the admiral, under these circumstances, could be entitled as directing and assisting in this [*92] capture. * It was argued, that Captain Milne, having acquainted the admiral with his intentions, and solicited his approbation, which, though not given, was not, however, refused, (Captain Milne having received no answer whatever to this communication,) the admiral's right to share must be admitted. For the defendants it was contended, that the orders which Captain Milne had received from the predecessor of Admiral Harvey in command, had been violated, and the voyage, appearing a matter of urgent necessity, undertaken upon his own responsibility alone; of which he was so perfectly conscious, that on his arrival with the convoy in England, he made immediate application to the Lords of the Admiralty, and obtained from them a sanction for the line of conduct he had pursued. This case, with the opinions delivered upon it by the several learned judges, is decidedly in favor of my argument. It cannot be doubted that flag-officers have a latitude of discretion, as well as greater privileges respecting that coöperation which they must afford to entitle them to share, than commanders of vessels.

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But will it, therefore, be contended, that they have also a right to a more extended latitude of discretionary disobedience? Certainly not. An analogy has been attempted to be instituted between the present case and the capture of prizes in the neighborhood of a blockaded port by a blockading squadron. Such captures are frequently made in direct conformity to the instructions for a blockade, and may be generally considered part of the service itself. It is nothing less than a *petitio principii* to argue that the enterprise is included within the exception of the seventh article, and that the quitting in the present instance is equivalent to a detachment by orders. And hence the principle *of Lord Ellenborough's decision should be particularly [*93] attended to, who, in his judgment in the case cited, strongly insists on the necessity there is to adhere to the letter of the proclamation itself, the terms of which contain no ambiguity. It is even urged there were orders issued by his lordship for this undertaking. Those orders, it should be carefully distinguished, pointed to another fleet of the enemy, which outsailed Sir John Duckworth's squadron. The sanction contended for ceases with this pursuit, to which alone the orders specifically pointed, and for which purpose The Acasta and other vessels had been detached to reinforce him; admitting, then, the imputed sanction as contended, Sir John Duckworth should, in compliance with the terms of this sanction, have immediately returned to his station. No argument can be drawn from his lordship's not having controlled this departure, because it appears plainly he had it not in his power to exercise this control. Where was his lordship to find this officer, who, in the exercise of a presumed discretion, had gone in pursuit first of one squadron, and afterwards of another, whose destinations were unknown to either his lordship or the vice-admiral himself. In order to maintain Lord Collingwood's title, recourse is now had to improbable hypothesis, and strained metaphysical constructions, which cannot for a moment be supposed applicable to the provisions of a proclamation intended to regulate the interests of plain men, totally unacquainted with legal artifice and logical subtlety. It is not intended to controvert the opinion, that the assistance of a superior flag-officer, constituting a fair claim to prize, rather implies general directions and prospective counsel, admitting also a considerable degree of *discretion [*94] to the inferiors in command. The directing and assisting mentioned in the proclamation as entitling him to share, extend, probably, in their constructive sense, solely to acts done within his station; but positive and express directions must be proved to have been given respecting any enterprise undertaken out of the limits of his

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station, as no inferior officer would be desirous of incurring a fresh responsibility without a perfect understanding with his superior, were there not, as in the present instance, a most urgent necessity existing for incurring this new responsibility, and running the hazard of future displeasure. On the nature of the third and fifth articles, it is only necessary to point out, that any discretion permitted to inferior flag-officers therein, merely refers to the limits of the station, and cannot, by any species of argument, be brought to bear upon the present question. The injury which the actual captors will sustain should the sentence appealed from be confirmed, is not confined solely to the proportion of the prize claimed for the commander-in-chief. This metaphysical inference includes also two other inferior officers as proportionate claimants on the flag-eighth. As it has been hitherto the uniform rule of the Prize Court, to exclude the matter of naval discipline, and confine its decision to the civil interests of the parties, it will no doubt be considered by your lordships expedient to act in this respect as the Lords of the Admiralty have already done, who have not concluded this enterprise, although undertaken without orders, a desertion, but proceed to deduce the respective civil interests of each from the fair and simple words of the proclamation.

To whatever may have fallen in argument from the opposite side, with respect to an increased responsibility upon the part of his lordship by his sufferance of the undertaking, it is only necessary to answer, that as Sir John Duckworth had exceeded his instructions, and departed from his station, the responsibility on his part was increased, whilst, on the part of his lordship, it was almost, if not altogether, suspended. Amongst other strange inferences to be drawn, as consequences of admitting the claim of Lord Collingwood to share in this instance, his lordship must be equally entitled to share in whatever prizes may have been made by The Powerful and Amethyst in their respective voyages to Great Britain and India, though then on the Mediterranean station, whilst reciprocally Sir John Duckworth must be considered entitled to share in the flag-eighth of all such prizes as may have been made by the Mediterranean fleet during his absence in the West Indies. These consequences, however extraordinary or absurd, naturally flow from the doctrine contended for by the respondents, and must stand or fall with it. The claim of Vice-Admiral Dacres is founded on the circumstances of the capture having been made within the limits of his station, as has been admitted; and that The Magicienne, which had constituted a part of the squadron under his command, must be supposed to have been by his directions and management put in the way of Sir John Duckworth, so as to be present and assisting in the

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capture. Vice-Admiral Dacres must be considered constructively on board his own ship, within his own station, directing and assisting at that time, and this without any forced rule of construction whatever, but in strict conformity with the plain meaning of the proclamation. Hence he derives a right as inferior flag-officer under his superior, Sir John Duckworth, *whose claim, could any considerations of equity interfere, would be no less supported by the distinguished courage and superior conduct he evinced throughout the whole transaction, than by the plain words and explicit intention of his Majesty's proclamation.

Stephen, for Sir John Duckworth and Vice-Admiral Dacres, jointly — Should the sentence of the High Court of Admiralty be confirmed, and Lord Collingwood be included in those entitled to share in the flag-eighth, the loss to all those actually engaged in the capture, and particularly to Sir John Duckworth, will be extreme, his share under these circumstances will be reduced to about 1,200*l.*, whilst Lord Collingwood will derive nearly 6,000*l.* from an enterprise begun, continued, and ended without his previous command or concurrence. Admiral Dacres will be totally excluded from any share whatever, whilst Sir Alexander Cochrane and Admiral Louis are placed upon an equal footing with the inferior flag-officers of the fleet in the Mediterranean. This distribution evidently seems to violate the intention of the legislature, so far as it is to be collected from the terms of the Prize Act, which solely admits the claim of those denominated "takers or captors." This intention is further demonstrated and supported by the express terms of the proclamation, which only provides for the interest of those actually present or directing and assisting in the capture. In order to give a feasible coloring to this pointed violation of the known law regulating prize distribution, your lordships are requested to increase the constructive effect of these unambiguous terms beyond that given to them in other courts. Inferior flag-officers, whilst following any scheme that may

*accidentally grow out of the original design or service to [* 97] which they were appointed, and which original intention may be thus totally defeated by their departure from orders, are yet to be considered acting under an implied sanction of their chief. But this construction is not consistent with sound policy or our maritime interest, since its consequences must evidently tend to frustrate the intentions of the admiralty to support any combined and consistent system of warfare. The principle contended for appears in all its grossness and impolicy in the present instance, for here it is held, that however wide, and however many these successive departures from

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the general orders given to the officer on his appointment may be, yet still he must be considered as acting under the orders and sanction of his chief. What will the supporters of this principle think of the many acts of indemnity which have been passed by the legislature, in order to exonerate from penalty parties which have exceeded the excellent general regulations adopted in the service, when upon this principle it would have been sufficient for them to have had recourse to the construction contended for to justify such conduct. Against such a principle of construction the decision in the case of Harvey and Cooke, already quoted, is decidedly adverse, as well as that in The Orion,¹ in the High Court of Admiralty, where a claim had been set up by Admiral Kingsmill, on the Irish station, for the flag-eighth in prizes taken by Sir Thomas Williams, captain of his Majesty's ship Unicorn, on a cruise in the chops of the Channel. This vessel had been detached by orders from the fleet on the Irish station to refit, with an injunction to return as soon as possible.

When ready for sea, Sir Thomas Williams received orders [* 98] * from the admiralty to take a short range in the chops of the Channel, for protecting or convoying the homeward bound trade, and after such cruise to rejoin Admiral Kingsmill. On this cruise the prize was taken; a claim to the flag-eighth was instituted on the part of the admiral, which Sir W. Scott rejected, conceiving, that in consequence of these orders of the admiralty Sir Thomas Williams was no longer under the immediate direction of the admiral, who, therefore, could not be considered directing and assisting in this capture. The judge even anticipates the query which has been put in arguing the present case, and adds, that "had Sir Thomas Williams taken upon himself this cruise on his own responsibility, it would be difficult for the admiral to build a claim to the flag-eighth on a capture so made."

It is peculiarly necessary, for the interest of the service, to guard against the indelicacy of confounding the motives which may actuate a superior flag-officer as the commander of a squadron, respecting any officer under his command, with those which may influence him as claimant of a property in litigation between them. When, from the nature of his official situation, a superior officer may feel it his duty to bring an inferior to trial upon a charge like the present, of quitting his station without orders, which might perhaps affect his life, the accused may be induced to suppose that resentment in the breast of his commander, for the loss of his share in the prizes taken

¹ Robinson's Reports, vol. iv. p. 362.

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in consequence of this disobedieuce, may have been no small part of the commander's motive in instituting the prosecution. To prevent any such misinterpretation or jealousy of the superior's motives, and leave no doubt on the minds of naval officers respecting their mutual *interests, the proclamation has been most cri- [* 99] tically accurate and explicit in pointing out all the possible relations in which flag and other officers may stand to each other, as well as the proportions in which they shall be entitled to share.

Amongst the endeavors made to show that the commander-in-chief sanctioned this enterprise, your lordships' attention has been directed to a private and unofficial letter sent by his lordship to Sir John Duckworth. This letter, however, refers solely to the fleet supposed to be cruising near Madeira, in pursuit of which he directs him to proceed, and acquaints him with the circumstance of his having detached a reinforcement to him for that purpose. No approbation can be supposed to be contained in this letter of any enterprise but that pointed to in the official letter, which, however, was not received.

Under these circumstances, the question now before your lordships is solely whether, as there were no orders given for this undertaking by the commander-in-chief, his subsequent approval, after its fortunate issue, can possibly affect the interests of all these different officers, who are the appellants in this cause. Hitherto the right of parties supposed to be concerned in a capture is vested solely by the capture itself, and has never been affected by *post facto* occurrences. Meritorious service, or incurred responsibility, have alone been the foundation of the claim of superior officers. To the first, the respondents can have no pretension in this instance; and it may very reasonably be asked, what responsibility could they have incurred had this enterprise, of whose existence they were not even previously apprised, failed? As his lordship possessed no power of controlling Sir * John Duckworth, all responsibility ceased [* 100] as soon as he had departed from the positive orders issued.

On the principle of the fourth article of the proclamation, which provides that no flag-officer passing through a station shall be entitled to share in any prizes taken in that station, by vessels under another flag or admiralty orders, except he shall be appointed to the command of that station by the orders of the Lords Commissioners of the Admiralty, the claim of Admiral Dacres is founded; since inasmuch as Sir John Duckworth could not, agreeably to this order, be entitled to any share in a prize made exclusively by The Magicienne, as being one of Admiral Dacres' squadron, Admiral Dacres must still be supposed to be on board this vessel, though coöoperating with

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the fleet of another flag; and must, therefore, be included within the number of officers entitled to share, as directing and assisting in the capture.

The *King's Advocate*, for Sir Alexander Cochrane. By the decree now appealed from, Sir Alexander Cochrane, an active, distinguished officer in this enterprise, finds his interests absorbed, in a great measure, by a man nearly five thousand miles distant, and this through the medium of an inferior officer who has passed into his station, without any commission or appointment for that purpose from the Lords Commissioners, or his commander-in-chief on the station he abandoned. He finds himself thus associated in this enterprise directly to his disadvantage, whilst nothing beneficial, either directly or indirectly, can possibly accrue to him from a junction with this

force, in preference to any other. Had he been associated [*101] with any other flag, which was independent of *another superior flag, his risk would have been no greater in the combat, whilst his share of the prize must have been vastly more considerable. Upon this subject too little has been said in the court below, when it is considered how extreme is that grievance of which he complains. If it appear his lordship cannot fairly maintain a claim against Sir John Duckworth, neither can such a claim affect the interest of Sir Alexander Cochrane. Upon this part of the case no doubt can be entertained. But should it be admitted, for the sake of argument, that his lordship had a fair claim to a share of prizes taken by his detached flag-officer, it cannot be inferred that he must have a derivative claim to share with Sir Alexander Cochrane, from the circumstance of his acting under this detached officer. For as by the eighth article of the proclamation captains of vessels, under different flags, making a joint capture, are required to pay to their respective flag-officers one third part of their share of the prize so taken; upon the same principle, no possible claim of any other officer can affect the share of Sir Alexander Cochrane, who must derive an immediate right to that proportion of the flag-eighth, which all admit he would be entitled to claim had he and Sir John Duckworth alone shared the prize. This must be the natural inference, from the circumstance of his being on a station altogether independent of his lordship, and having no communication either directly or indirectly with him. In conformity with the general principle which has been laid down, Lords Nelson and Bridport, in a case of joint capture by four frigates, two belonging to the Mediterranean and two to another station, derived each their respective flag-eighth from the captain's share of those frigates severally belong-

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ing to their * particular stations. This principle is supported by the whole tenor of prize regulations. The amendment of the Prize Act restrains the interest the commander-in-chief or flag-officers may have in prizes taken, to the time of his arrival on the station ; and the tenth article of the proclamation, in pursuance of this principle, provides, in the case of many flag-officers claiming as joint captors, that the prize shall be distributed solely to those serving together at the time of capture.

SIR W. GRANT. It appears, from the manner of distributing a privileged share to the superior flag-officer, when more than one are engaged together, that, under the tenth article, an inferior officer, although coöperating with a greater number of ships than his superior, may derive a share of prize considerably less than him.

It would, perhaps, be more just that each flag-officer's share should be regulated by the number of ships acting under his command at the capture. The tenth article, no doubt, considered that in determining in favor of the superior officer, it also determined in favor of him having the greater number of vessels under his command ; and that probable case, to which the court has alluded, must only be considered one not foreseen or provided for by the proclamation. And, in such a case, a judge must decide according to the known spirit of his Majesty's proclamation, and those legislative acts which have passed on this subject. Under the present existing regulations, there can be no difficulty in deciding how the prize should be distributed in this instance. The equity of the regulation * respecting captains of vessels who may be actual [* 103] joint captors, applies with equal force to flag-officers, under similar circumstances. The inconvenience which must arise to the service from admitting that latitude of construction to the terms, "directing and assisting," must prove a sufficiently cogent reason to reject any such latitude. One of its extraordinary consequences must be, that Sir John Duckworth and Sir Alexander Cochrane are entitled to share in all prizes taken by the Mediterranean fleet during their coöperation in the West Indies. If your lordships shall be of opinion this principle of constructive direction and assistance is inadmissible in the present case, whether the squadron of Sir John Duckworth is determined to be acting solely under the sanction of the admiralty, or without any sanction and upon his own responsibility, the interest of Sir Alexander Cochrane, as flag-officer in a joint squadron, must be materially served, and his proportion of prize considerably increased.

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Dallas, same side. As the right of Sir Alexander Cochrane is admitted by all parties, it remains only to show what share he is by law entitled to claim. As the case now stands, this depends altogether on Lord Collingwood's claim being admitted or rejected. From the whole tenor of the proclamation, he can have no possible right to the prize. In support of this assertion, I must also beg leave to claim for Sir Alexander Cochrane the full benefit of what has fallen, in the very able and conclusive argument of the learned counsel, in support of the claim of Admiral Dacres. By the seventh article, no flag-officer on the station from whence Sir John Duckworth departed can be entitled to share in his prizes, as he is not within the operation of the exception. By the eighth, in [*104] cases of joint capture *under different flags, the proportion the different flag-officers are entitled to is most accurately defined. Thus, perhaps the flag-officers might share less than the inferior officers, where more flags than one, and of different stations, are engaged in the capture. Hence, if Lord Collingwood derived any right to share, it could only be from the proportion of prize allotted in the distribution to Sir John Duckworth, and not from that of Sir Alexander Cochrane. The eighth excludes his lordship from any share in the latter's prize; the seventh from any in that of the former; and, most probably, your lordships will be induced to decide upon the principle of the seventh article, as having a direct reference to the situation of his lordship and Sir John Duckworth, no orders having even been issued from his lordship for undertaking this voyage; although it is by no means intended to urge that this quitting was by any means criminal. Should the decision turn upon the principle of the eighth article, it will be attended with most advantage to Sir Alexander Cochrane's particular interests; but whether it be in conformity to the obvious tenor of the one or the other, it must be attended with the most serious advantages to the actual captors.

Leach, in reply. The arguments in support of these appeals have been principally deduced from the seventh article of the proclamation, upon which, it has been asserted, our cause principally rests. This is by no means the fact. The claim of the respondents is founded totally on the general principle of directing and assisting, taking the terms in their clear unambiguous sense. The plain interpretation I also admit to be most consistent for the interests [*105] of the *parties, and the general benefit of the service. The quitting a station mentioned in this article, means simply quitting that relation in which the inferior is considered to be whilst

The Diomede. 1 Acton.

under the command of his superior. In this sense, the inferior may quit the station to which he has been appointed, and yet maintain this relation. Whether, therefore, this relation subsisted at the time of capture, is the important question for decision, and this is altogether a question of fact. I would even submit, that Sir John Duckworth is included within the clause relating to flag-officers detached on a particular service, with orders to return. He could not but be aware of his commander's wishes in the circumstances under which he was placed, and what would necessarily be his orders, could he possibly receive them. Promptitude is particularly necessary to anticipate the danger which appeared imminent. For such cases, and even those of inferior importance, the nature of the service had given to officers in his situation, a virtual discretion. This amounts to a permission, though not perhaps in express terms; and, acting upon such a permission, he must be concluded to engage in the enterprise relying on the accustomed sanction of his chief. To deny this discretion would be to injure the service, degrade the situation of flag-officers, and endanger the country's best interests. This discretion, in a case when a capture is made by blockading squadron of a vessel within the limits of the blockading station, is admitted by all, should this vessel be attempting to enter the port blockaded; but it will extend much farther, and sanction the capture, should she appear to have no intention of entering the port at all. There is a general duty imposed on every officer by his commission to distress and destroy the enemy, to *protect and succor our ships and those of our [*106] allies. This general duty should ever actuate an officer, whatever may be his particular destination or occupation, and is only subject to one restriction, namely, that the particular service to which he has been appointed shall receive no detriment by this exercise of his discretion in performing the more general duty of warfare. In some instances it has been objected, this exercise of discretion might be dangerous. Admitted: yet this permission to exercise a discretion is supposed to be ever regulated by prudence, and probability of success. It is absolutely expedient for the service; and if success could ever justify the exercise of it, this distinguished officer certainly was entitled to that sanction upon which he relied, and for securing which he appeared so solicitous throughout the cruise. The facts already stated show his anxiety to inform his commander, and also the conviction he himself entertained, that he was acting in the relation I contend for,—that of an inferior under the command of a superior. This particular enterprise is undertaken expressly in the conviction, that the Spanish fleet cannot put to sea, to prevent which he had been appointed to that station. In this opinion he was also borne out by the fact. The appeals are supported on the ground of his

The Diomede. 1 Acton.

desertion from his duty. Such an argument may be introduced here to support a civil interest; but that it never entered into Sir John Duckworth's mind may be collected from his answer to his lordship's letter by The Acasta, wherein he speaks in terms that show he is no delinquent in his own estimation. He must have quitted ~~this~~ station, therefore, in pursuance of general orders from his commander, or from some other paramount authority. Lord Collingwood, it is [*107] plain, *had a power to control the enterprise from the frequency of communication during it, yet he never exercised it; and after the month of December, Sir John Duckworth writes no more to his lordship, having been already convinced of his acquiescence in the conduct of his operations by previous letters, and the verbal communications of Captain Dunne, purposely despatched to confirm him in the prosecution of this enterprise. The principles upon which his lordship's claim is founded are made stronger by the very objection urged against the claim. It is said, that as he had been detached to follow the Rochfort fleet, and did not come up with them, his discretion or his commission was at an end. Had he met the Brest fleet without seeking them, should he not have engaged it? Had he received undoubted information that it threatened our colonies, should he have left it to devastate and destroy? He obtains this information, and acts upon it in strict conformity to his duty, and the discretion vested in him. Though he lost the first fleet at sea, this discretion justified his pursuing them to the West Indies, where he had strong reason to conjecture they had bent their course. In the case of *Harvey v. Cook*,¹ the judgment of the court, which pronounced against the claim of the commander-in-chief, proceeded upon the ground of admitted disobedience.

SIR WILLIAM GRANT. Is it contended this disobedience is any other than that here mentioned?

Certainly. Captain Milne left his station, and proceeded afterwards, without any orders, to convoy to Europe the trade, for [*108] which purpose another vessel had * been expressly appointed, but had not then arrived. Sir John Duckworth went in pursuit of an enemy, which must, but for his activity, have escaped, and, perhaps, ruined the trade of our colonies. To the case of The Orion, it is not necessary to make any reference, since it appeared the captor was acting under the express orders of the admiralty. The principle I contend for will bear me much further. Had Sir John Duck-

¹ East's Reports, vol. vi. p. 234.

The Diomede. 1 Acton.

worth gone under express orders to the East Indies, and taken a prize within the limits of the admiral's station there, there can be no doubt of Lord Collingwood's title to share. Had he no express orders, it must still be as clearly made out by this construction and implication as acting under the command and control of a superior.

With respect to the claim interposed on behalf of Admiral Dacres, it must be admitted, that no orders could have issued, or be supposed to have issued from him; therefore, in this capture he cannot be supposed to be either directing or assisting, although the capture took place within the limits of his station. The Magicienne, upon whose assistance he builds his right to share, did not act subject to his orders; she *pro re nata*, had ceased to be under his authority and command. The latter part of the first article completely overturns any claim on the part of Admiral Dacres. Upon the fourth no claim can be founded, as it refers solely to captures made by vessels within their own station, and not acting conjointly with others, and Sir John Duckworth derives, not as passing through the station of Admiral Dacres, but in consequence of assuming The Magicienne, under his command, as superior officer, and actually making a joint capture. Upon the tenth article, Lord Collingwood must be included

*within the number of flag-officers, acting together in this [*109] capture, by his constructive counsel and direction. Upon all the facts of this case, it appears Lord Collingwood was from time to time directing and assisting in this capture, that he was responsible for the enterprise undertaken in consequence of general orders issued by him, and is, therefore, with his inferior flag-officers on his station, entitled to a share in the flag-eighth.

SIR WILLIAM GRANT. Are you disposed to contend, that even Sir Alexander Cochrane, in consequence of his being assumed under the command of Sir John Duckworth, an inferior flag-officer under Lord Collingwood, is entitled to share in all prizes made in the Mediterranean station ?

Such an inference, perhaps, might be drawn from the circumstance of his having been assumed by his superior officer, who was detached from the Mediterranean station.

The court, after consulting for a considerable time, expressed a wish to take further time to deliberate.¹

¹ The decision in this case not being pronounced previous to the vacation, and the work having gone to press immediately after the conclusion of the session, we are unavoidably compelled to give it a place in our next number. [Post, p. 239.]

[*110]

* L'INVIDIATO, Casnacich, master.

July 13, 1809.

Delay in exhibiting further proof, suspicious. If unreasonable, and beyond a time prescribed for introducing further proof, an affidavit required, to account fully for the delay, prior to any permission given for its introduction.

In this appeal from a decree of the High Court of Admiralty, respecting part of the cargo of L'Invidiato, a Ragusan ship, which had been conditionally condemned as prize to the captors, unless further proof of property were exhibited within a certain space of time, a question arose, whether, after the expiration of the term prescribed for exhibiting further proof, the appellants might be permitted to introduce those papers ordered in the court below, but which had been detained by the uncertainty and delays incident to the communication between this country and the Ottoman empire..

Dallas, for the captors, stated this vessel on a voyage from Smyrna to Amsterdam, and claimed for Ragusan subjects, had been condemned in the High Court of Admiralty, as a prize to his Majesty, being captured prior to a declaration of hostilities ; part of her cargo proved to be the property of Ottoman subjects, had been restored after further proof had been introduced, and the remaining part, respecting which no additional proof had been furnished, in pursuance of the order of the court, had been condemned by interlocutory decree, unless further proof should be exhibited before the month of March, 1808. The time prescribed had transpired nearly sixteen months. There must necessarily arise a suspicion, that the delay had been occasioned by a total want of fair and satisfactory documents, and that the [*111] intervening time had been *employed in constructing and preparing such papers as might answer the fraudulent purpose of the claimants. This there was the greater reason to suspect from the promptitude with which the other parties had exhibited their proofs, upon which they had obtained restitution of part of the cargo, whilst the papers now endeavored to be introduced, were said to have been made out exactly at the same time with those of the other parties. Against the admission of such proof, there was, therefore, the strongest reason to object, in which case the condemnation of the goods in question would ensue as a matter of course.

Arnold and Stephen for the appellants stated — That as the vessel

L'Invidiato. 1 Acton.

had been taken in a time of profound peace, without, therefore, any motive for concealing the nature of the property on board, and as there had been only a slight defect in the original proof of property, the parties were entitled to an indulgence founded in strict justice.

[SIR W. GRANT wished to know how they accounted for these proofs not having been furnished at the same time with those upon which the other parties had obtained restitution, though both had been prepared and completed at the same time ?]

By the obstruction of the post, and the different route by which these papers had been transmitted, namely, by Malta, whilst the others were despatched overland by Holland. As the anxiety to obtain a safe mode of conveyance had been the real cause of the delay, and the papers had been verified by the *Bri- [*112] tish consul in Turkey, there could not be any justifiable objection made to their reception, especially as there was an affidavit by a British merchant residing in London annexed, to prove these papers had not come to hand until after the time appointed in the court below.

Dallas objected — That as eighteen months from the time of the capture had been allowed the parties to produce proof, prior to a sentence of condemnation upon the cargo, the appellants had no claim to further indulgence; and that, unless some line of limitation were drawn, the business of the court must be extremely impeded by the probable frequency of such applications.

SIR W. GRANT considered it would be necessary, before these proofs should be permitted to be introduced, that some further attestation should be made by the parties, in order to show where these proofs had lain during the time which had transpired since their leaving Turkey, as well as the reasons assigned for the extraordinary delay.

The St. Antonius. 1 Acton.

[* 113] * THE ST. ANTONIUS, Willems, master.

July 13, 1809.

Application for expenses and damages incurred by detention under circumstances apparently of a suspicious nature, refused, although these circumstances appeared to be so far consistent with the letter of his Majesty's license, as to induce the court below to restore the vessel.

THIS vessel, under the protection of his Majesty's license to trade to any of the ports of Holland, and with liberty to touch at Tonnin-gen to obtain fresh clearances, sailed from Liverpool with a cargo of rock salt. Whilst standing off the islands of Schowen and Walcheren, with an intention to enter the river Maese, she was boarded by The Growler, gun-brig, and carried into Harwich for adjudication. In the High Court of Admiralty the vessel and cargo had been restored, as acting under the protection of his Majesty's license. From this decree an appeal was prosecuted by the owner for costs and damages sustained in consequence of her detention.

The *King's Advocate*, for the captors, objected to the extravagant extent and unjust nature of the demand made by the appellants. The cargo on board had only been valued at 100*l.* when shipped in Liverpool; but a claim was now made for costs and damages to the amount of 1,000*l.*, said to be incurred in consequence of this interruption in the prosecution of her voyage. This was to contend that the captors were liable to be compelled to restore, not only the positive loss sustained by the owners, but also to compensate the probable gain which might have been derived from an undertaking which had been conducted with great impropriety, and in which there were the strongest suspicions excited in the mind of the captors, that the vessel was about to make either the port of Ostend or Dun-

[* 114] kirk, which the license had * given no permission to enter.

Hence, the captors having observed the vessel for a considerable time standing off the islands Schowen and Walcheren, without any apparent reason to justify its continuance in that situation, were induced to suspect the intention of the master was to carry on an interdicted trade with the enemy, and, therefore, performed only a duty in carrying her into Great Britain for adjudication. Whatever loss had been sustained was totally owing to the imprudence of the master of the vessel, and could not justly be demanded from the captors.

The St. Antonius. 1 Acton.

Dallas, for the appellants, stated the hardship and loss sustained through the detention of the vessel by the captors, notwithstanding the master had produced, when boarded, the license of his Majesty to enter the port, which he was then endeavoring to make, but which the uncertain state of the weather prevented him from entering for some days. He, notwithstanding the adverse state of the weather, continued to beat up to the port of his destination; and, as far as wind and weather would permit him, during the whole time never altered his course, although thrice boarded by the captors in this situation. No attempt had been made at any time to approach any other port, although perfectly practicable. After the vessel had been carried into port, the captors became alarmed for the consequences of this unjust detention, and offered to liberate her on payment of their expenses. The owner assented to accommodate the difference by mutual concession, so as that no further expense should be incurred. This proposal was not complied with, and proceedings being instituted, the vessel was restored, but no allowance made

for those expenses unjustly accumulated on the owner by [115] the obstinacy and cupidity of the captors. It must be evident, that had it been her intention to have gone into any port of France, she might with equal ease have procured a license for this purpose. Hence, there had appeared no ground for her detention in the court below, but as no allowance had been made for the losses sustained in not bringing her cargo to that market, at a time when it must have sold extravagantly high, and the whole cargo having been since almost rendered worthless by the ship's having sprung a leak in consequence of being run on shore at Harwich, the owner was encouraged to hope, that as nothing had been left undone to satisfy the captors of the justifiable nature of this voyage when at sea, that they would not be permitted to detain her without paying the severe loss and expense which had been incurred by this unwarrantable detention.

JUDGMENT.

Their lordships confirmed the decree appealed from, and condemned the appellants in the costs of the appeal.

[*116]

*JUNGE RUITER, De Ruiter, master.

July 13, 1809.

Neutral domicil. A *bond fide* residing of the proprietor and family, though subject to periodical interruption on his part, occasioned by the nature of his professional avocations, decisive as to national character.

By the decree of the High Court of Admiralty, this vessel had been restored to the owner, (who was also master,) as a neutral vessel, the property of a subject of the Duke of Arenberg, residing at Papenburg. From this decree the captors appealed.

Swaby and Stephen, for the captors — If the national character of a ship is to determine that of the master, there will be in this case sufficient ground for condemning the vessel, without referring to the suspicious nature of the trade in which she was engaged. This vessel was taken on a voyage from Tremblade, in France, to a market, laden with salt. She is described by her papers to be a Papenburg vessel, and is furnished with a passport from the Duke of Arenberg. The master, in his examination, states her to be his own property as well as her cargo; that he bought her from a Papenburg merchant, and had constantly employed her since that purchase in the timber trade from Norway to Delftziel, Amsterdam, and Embden. The usual port of resort has been Delftziel; here he has refitted and lain during each successive winter, and she appears never to have been in Papenburg during the ten years she has been his property. Thus she has ever been employed in carrying on a trade from an enemy's port, and consequently to the advantage of the enemy. Hence, upon the principle which influenced the decision of the judge of the

High Court of Admiralty, in the condemnation of The En-
[*117] *draught,¹ this vessel must be considered actually the property of the enemy, since the only circumstance that points out the master's connection with Papenburg is his having a nominal domicil there, by its being the residence of his wife, and occasionally that of himself during one half the year. This, if it proves any thing, proves an equal domicil in both places. A transfer appears by her papers to have been made of the property of the vessel. This, it is submitted, is merely an artifice to cover enemy's property, which

¹ Robinson's Reports, vol. i. p. 28.

M'Anuff v. Willis. 1 Acton.

may be inferred from the constant money transactions he appears to have had relative to this vessel with a mercantile house in Amsterdam.

The nature of the voyage is also suspicious. The vessel obtains a cargo at Tremblade on adventure. She is thus without any specific port of destination, and prepared to engage in any speculation, or enter any port it may be thought convenient. It is, therefore, submitted that, upon the principle cited in the case of *The Endraught*, the domicil is not fairly made out; and that, upon the doctrine established by the judgment in the case of *The Vigilancia*,¹ the transfer of property is merely made for fraudulent purposes, and that these objections, in conjunction with the doubtful and suspicious nature of the trade in which she was engaged, must prove fatal to the asserted owner's interest, and produce the condemnation of the vessel and cargo.

SIR W. GRANT observed, that as there were two certificates in different periods of peace, proving the vessel to be Papenburg property, and the vessel's trade had been carried on principally to the Eems, the * decree of the court below ought to be affirmed. [*118] A sufficient indulgence had been given in the court below to the captors, by allowing their expenses. With this they should have been satisfied. The court, therefore, thought it only a duty to condemn the appellants in costs.

* AT COUNCIL.

[*119]

M'ANUFF v. WILLIS.

July 15th, 1809.

Mortgage debts, due on West India estates, demurred against as usurious. The demurrer overruled, as informal and contrary to usage. The question of usury not considered to be therefore fairly before the court.

In this appeal from the Chancery Court of the island of Jamaica, the appellant, the surviving executor of the will of a West India

¹ Robinson's Reports, vol. i. p. 4.

M'Anuff v. Willis. 1 Acton.

planter, prayed the sentence of that court might be reversed, which had decreed that the estates of the testator were subject to sundry debts contracted by him during his lifetime, but which the appellant contended had been usuriously incurred, and for which, therefore, the court could in equity give no remuneration.

Hart, for the appellant. The testator, Robert Minto, had, it appears, engaged deeply in speculations in the West India sugar trade, in so much so, that he found himself compelled to borrow money on his estates in Jamaica. On the 1st of August, 1799, by a deed of mortgage, the testator conveyed to the respondent and his partner, Mr. Waterhouse, merchants in the West India trade, a plantation or sugar-work called Water Valley, with the slaves and stock thereon, as a security for 6,263*l.* then due, and for all such sums as should be lent or advanced by the respondent and his partner; and also executed a certain deed of defeasance between the

[*120] same parties, and of the same date, whereby * it was stipulated that,

that, until said sum, and all other sums which might be by him hereafter due to the respondent and his partner, should be fully paid off, this Robert Minto should ship and consign to them in England all the produce of the said plantation in mortgage, and also of another plantation called Dry Valley; and should also agree to purchase from the respondent and partner, or their correspondents, all such provisions, negro-clothing, utensils, supplies, &c., as should be requisite to be imported by him from Great Britain and Ireland, or be purchased in Kingston, Jamaica. During the time Minto should so perform these several agreements faithfully, these merchants bound themselves not to take any measures for the recovery of their demands, until after the expiration of five years from the date of the deed. Willis and Waterhouse, as a further security, obtained the transfer of a mortgage of the plantation called Dry Valley, for 5,000*l.* and interest, by indentures of lease and release, which mortgage had been originally granted by said Minto to one J. Gowland, of that island. Minto continued to borrow considerable sums of money on this agreement, and although experiencing those fluctuations of crops, &c., peculiar to that island, discharged a considerable portion of this increased debt. At this time being possessed of other real estates, particularly one called Jock's Lodge, in the neighborhood of the others mentioned, he made his will, dated 21st December, 1802, investing this appellant, the said Waterhouse, since deceased, and another, also deceased, with the whole of his property, as executors for the performance of this will, and devising this said property to his family; shortly after which, Minto died.

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The executors took * possession of the property, and pro- [* 121] ceeded to apply the net proceeds thereof to the special trusts contained in the will, and the payment of his debts justly due, refusing to pay the debts asserted to be due under the several covenants before mentioned. A bill was filed by the present respondent, as the survivor of the firm mentioned, in the Chancery Court of that island, praying that the matter might be referred to a master, to ascertain the property, and make provision for the payment of the debts due to him on the mortgages alluded to, from the funds in the hands of the executors, or from the sale of the two mortgaged estates ; or, in case of this property being insufficient, from the additional sale of Jock's Lodge estate ; and that, until the final hearing of the cause, receivers should be appointed for the proceeds of the three estates, the proceeds of the two first to be applied to the liquidation of the mortgage debts, and those of Jock's Lodge to the trusts mentioned in the will. On the 30th June, 1806, the appellant lodged a demurrer to so much of this bill as stated that the indenture of mortgage of the 1st August, 1799, was and remained a subsisting lien and charge upon the plantations Dry Valley and Water Valley, and prayed the court that an account might be taken, and satisfaction made, of the amount supposed to be due on the said mortgage ; alleging, as a cause of demurrer, that it appeared by the respondent's own showing, and by his bill, that he had no equity or title whereon such a demand could be legally made. This demurrer was soon after argued before the chancellor of that island, and overruled. Satisfied of the justice of his cause, and the strength of the documentary proofs on which his application * was founded, [* 122] though overruled, he now appeals to your lordships. Of the fact, that the respondent and Waterhouse availed themselves of the pecuniary distresses of the testator, in order to obtain an usurious contract from him, there can be no doubt, from the date of the instrument of mortgage and that of the defeasance being the same. Thus his real property became mortgaged for an accommodation in money, for which he payed usual and lawful interest ; whilst his personal property, that is, the proceeds of his real, was again mortgaged for the same debt, and, by being exclusively consigned to them, they obtained, in addition to the commission and percentage consequent upon the homeward consignments of sugar and other produce, also a commission and profit exclusively secured to them, from supplying the necessary stores and consumption of the estate in the West Indies, which he was, by contract, bound to take from these usurious money-lenders in Great Britain. His being bound by a covenant thus securely, certainly proves, beyond a doubt, that it was not with-

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out some material consideration that agreement was entered into. It was solely in order to obtain the loan on mortgage. There may have existed a false delicacy on the part of Minto, who was a party to this transaction, which probably prevented him from exposing its iniquity; but this conduct would be totally inexcusable in an executor. He therefore openly exposes the shameful nature of the contract, and trusts he will not fail to defeat the designs of an usurious violator of the law upon the property of a family totally unacquainted and unconnected with the acquiescence of the parent in this scheme of fraud.

[*123] * *Sir Samuel Romilly and Stephen* for the respondent.

The nature of property in the West Indies is so fluctuating and liable to accident and injury, that on almost all occasions it is found very difficult to obtain money on estates in that country from merchants in this. To countervail these natural disadvantages, planters are in the habit of giving much greater interest for their loans than others who borrow money. The legal interest of money in those islands vary in different places from 5*l.* to 8*l.* per cent., and even more in some particular places; and it is usually the custom on lending money on such property, to require that the produce of the estate be yearly consigned in order to pay off the interest or principal of loans of this description. The lender is constantly the consignee; nor is it unusual also to make such lenders the factors or agent to these estates; and it is well known they must, of course, derive from hence certain emoluments by way of commission or agency. Hence, according to the supposition that these two deeds, one of mortgage, the other of defeasance, were parts of the same transaction, there appears nothing in the contract but that which is every day done, under similar circumstances, with respect to money lent on security from West India plantations. But it remains with the appellant to prove that these deeds, though apparently executed on the same day, were parts of the same transaction, one depending on the other. Of this there is now no evidence before the court.

But from the construction of the demurrer itself, there arises an objection of this court's giving any relief in this case; for the demurrer has, contrary to the usual mode, been made by [*124] the appellant to part of * the bill filed, and an answer put in as to the remainder. On this irregularity it is submitted to the court, that the demurrer should be altogether overruled, as made solely to protract the payment of debts justly due. The charge of usury made against the respondent would with equal justice be applicable to all bankers in London, who discounted bills

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for their customers, not solely with a view to the legal discount thereon obtained, but in a thorough conviction that a considerable portion of the money would remain floating in those profitable channels to which they meant to apply it in the course of banking business.

Hart, in reply, contended, that as the intention of a demurrer was to define the point at issue, and expedite the course of justice, it was perfectly fair and correct in the party to demur to part of the bill and answer the remainder. If the practice of bankers alluded to were general, he had no hesitation in saying, that bankers were generally guilty of usury, and would be within the provision of the acts made against usurious contracts, had those advantages been stipulated for by positive written articles, and not left to a sort of implied understanding between the bankers and their customers. But this defeasance was a written fraudulent contract, which it was the duty of the appellant to expose, and that of the court to punish, in the equitable spirit which appeared to actuate the legislature at the time of the passing of the act against such usurious covenants.

SIR W. GRANT. The question is of such material importance, and may hereafter be so often agitated before this and other courts, that I feel disposed, for *my own satisfaction, [*125] as well as that of the other lords present, to take some time to deliberate whether, first, from the nature of the objection urged to the pleadings, we can with propriety give any relief; and secondly, what that relief should be, and how far it ought to extend. Probably on the next day of sitting we shall be prepared to decide.

On the 18th July the court pronounced the following

JUDGMENT.

SIR W. GRANT. Although it is extremely desirable that justice should as soon as possible be administered between the parties in this case, as well from the facts which have been established upon undisputed evidence, as from the criminal nature of the charge made against one of the parties in the transaction, it appears, under the present circumstances, out of the power of the court to decide further upon the present appeal than by overruling the demurrer. It has been objected, that this is not the manner in which this question should have been introduced to the court, as it must preclude the possibility of giving substantial justice to the parties. The regular

Hadwin *v.* Lovelace. 1 Acton.

mode in which it should have been introduced, it has been said, would be by bill, that the other party might put in an answer, in order to explain each part of the transaction. In this opinion I also coincide; and such, indeed, would have been my opinion, even if all the covenants contained in the first agreement between the parties had also been included in the second, in which case the usurious nature of the contract would have more clearly appeared.

[*126] *But when the clauses upon which the charge of usury is founded, (and upon which this charge cannot be maintained unless a clear connection between these two contracts can be distinctly proved,) are contained in separate articles of agreement, which may or may not have this fatal reference to each other, it is not consistent with the usage or practice of a court of equity to permit this mode of proceeding. Without assuming, therefore, the covenant to be usurious or otherwise, upon which the court is not prepared or disposed to decide, but leaving the question of a usurious contract open to investigation hereafter, there can be no doubt that, upon the legal objection mentioned, the decree of the court of Jamaica ought to be affirmed.

AT COUNCIL.

HADWIN *v.* LOVELACE.

July 15, 1809.

Insurance. Plea set up by the insurer that the damages sustained by fire had not been ascertained in the mode prescribed by their particular office, rejected, as the damage appeared to be fairly ascertained.

THIS was an appeal from the Superior Court of Gibraltar, which had condemned the appellant, as the agent of The Phoenix Insurance Company in that settlement, to pay the respondent the total amount of damages sustained by fire in premises insured by the appellant, as agent to that company, and for which he had received the usual premium, on issuing an order to this company to provide the respondent with the necessary policies.

JUDGMENT.

SIR WILLIAM GRANT. The fact of the insurance and the conflagration are both admitted. The *quantum* of damages [*127] sustained * would, therefore, it is probable, be the only

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point the court would be called on to decide, were there not an objection made by the appellant as to the manner in which the damage seems to have been ascertained. Here the appellant alone seems to blame. After the fire he is required to attend a survey to investigate the loss. This he refuses, without assigning any reason, but signifying his intention to protest against any claim that might afterwards be made against the company. After some time the respondent brings his action in the civil court; the appellant pleads he is not prepared, and is sentenced to pay the amount of the loss sustained. From this he appealed to the Superior Court, stating, for the first time, the reason of his objecting to the demand, namely, that the demand had not been substantiated by the respondent agreeably to the proposals of the company for effecting the insurance and ascertaining any loss that might be sustained in order to entitle them to repayment. This could not fairly be attributable to the respondent, since the appellant had absolutely refused to assist in ascertaining the damages sustained. Notwithstanding the respondent had not exactly complied with the printed requisitions of the company for ascertaining the property lost, the two inferior courts had been of opinion he had fairly accounted to them for the claim instituted, by his own affidavit, and the certificate of several merchants who had attended the survey. Hence the present appellant became answerable in his own person, by the decree of the court below, for the amount of the damage, from which we cannot see he has any just reason to appeal, and therefore confirm the decree.

* NORDSTERN, Samsing, master.

[* 128]

July 18, 1809.

Claim on principle of joint capture, rejected. To sustain such claim it is not sufficient to show a general coöperation only, or one for purposes distinct from that of capture, but absolutely necessary to prove that the coöperation had a distinct reference to the capture, which capture should be the joint produce of this coöperation, and the object for which the vessels were united.¹

A QUESTION arose as to the right to share in the cargo of the prize

¹ [The following cases have been decided respecting joint captures: — The Felicidade, 3 W. Rob. 45; The Vryheid, 2 C. Rob. 16; Le Bon Adventure, 1 Acton,

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in question, on the part of several officers of a squadron of his Majesty's ships employed in the blockade of the port of Cadiz, asserted joint captors. The cargo of the vessel had been condemned in the Vice-Admiralty Court of Gibraltar, as prize to the actual captors. This sentence had been confirmed on appeal by their lordships, so far as referred to the condemnation of the property as prize generally, reserving the question by whom taken.

Swaby, for the appellants. Under general orders issued by Lord St. Vincent, as commander of the Mediterranean fleet in 1798, to Sir John Orde, to proceed with a squadron to blockade the port of Cadiz, in order to prevent the egress of the enemy's fleet, which was then in a state of preparation for sea, and detained all vessels passing between Spain and the Spanish West India islands; the usual dispositions for a blockade were made by that officer; the ships of the line under his command were disposed at some distance in the offing, keeping up a communication with each other, and extending in a circle outside the mouth of the harbor, whilst the frigates and lighter vessels were placed within the harbor, with orders to cruise as near in shore as they could with safety, in order to watch the motions of the enemy. The communication was constantly kept up between them and the exterior squadron, and on a [*129] *particular signal made from the fleet by the commander, all the frigates engaged in this service were to approach as close to the enemy's works as possible, without materially endangering themselves, for certain purposes of the blockade. Under these regulations, the actual captors, The Emerald and Thalia, forming a part of the inner squadron, were, on the 30th March, 1798, cruising in shore, and observed the prize coming out of Cadiz, which was soon after boarded by The Emerald, and sent into Gibraltar for adjudication, where the vessel was restored as Danish property, but the cargo condemned as lawful prize to The Emerald and Thalia, which were

211; *La Virginie*, 5 C. Rob. 124; *The Island of Trinidad*, 5 C. Rob. 92; *L' Amitie*, 6 C. Rob. 261; *The Zepherina*, 2 Hagg. Ad. R. 317; *La Furieuse*, 1 Stewart, 177; *The Flight*, 1 Stewart, 559; *La Belle Coquette*, 1 Dod. 18; *The Odin*, 4 C. Rob. 318; *The Guillame Tell*, Edw. 6; *The Bellona*, Edw. 63; *The Forsigheid*, Edw. 124; *La Niemen*, 1 Dod. 9; *Buenos Ayres*, 1 Dod. 28; *The Union*, 1 Dod. 346; *The Financier*, 1 Dod. 61; *The John*, 1 Dod. 363; *The Diligentia*, 1 Dod. 404; *The Genoa*, 2 Dod. 88; *The La Henrietta*, 2 Dod. 96; *The Galen*, 2 Dod. 89; *The Melanie*, 2 Dod. 122; *L'Etoile*, 2 Dod. 106; *The Cape of Good Hope*, 2 C. Rob. 274; *The Fadrelandet*, 5 C. Rob. 120; *The Aviso*, 2 Hagg. 31; *The La Flore*, 5 C. Rob. 339; *The Stella del Norte*, 5 C. Rob. 349; *The Sociedade Feliz*, 2 W. Rob. 155; *The Nostra Signora del Dolores*, 1 Acton, 262; *The Minerva*, 2 Acton, 112.]

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then the only claimants. This sentence of condemnation as prize generally was confirmed on appeal to your lordships, and an intervention granted to let in the claims of the remaining ships on that particular service. The question upon which, therefore, the court has now to decide, is whether the capture was made in consequence of the dispositions of the whole blockading squadron, and that system of concert and coöperation established by the commander on the station? The case of the appellants is founded on the facts already stated, with respect to the general enforcement of the blockade, in conjunction with the peculiar circumstances under which this particular capture was made. During the blockade, the commander on the station received information that a Danish vessel laden with Spanish property, and bound for the Spanish West Indies, was about to depart from the port of Cadiz. This, according to custom, was inserted in the order or notice-book, from which the several lieutenants of the ships under his command had transcribed it, with others, for the regulation of their conduct. Thus it appears, that the whole fleet had been apprised of the intention of this vessel to "sail, [*130]" and were consequently perfectly prepared to prevent her escape. It is admitted, however, that at the time of the capture it is rather doubtful whether any of the line of battle ships were in sight, or whether the prize was seen by any of them until the following day. This admission, it is presumed, cannot affect the claim of the appellants, as the ground upon which they appear before the court is that of a preconcerted scheme of coöperation. If it can be established, that such existed at the time, and that these frigates could not have maintained their situation so close into shore, as to enable them to have made the capture at that particular time and place, in defiance of the Spanish ships of the line within the harbor, the remaining vessels of the squadron must be considered entitled to share as joint captors within the literal meaning of the prize act, and also of the proclamation of his Majesty relative to the distribution of prize. The evidence upon this part of the case is most satisfactory. Sir John Orde, who was succeeded in his command the day previous to the capture by Sir W. Parker, under orders from Lord St. Vincent, in his examination, alleges the whole fleet was, at the time of the capture, coöoperating with the frigates in shore, and was so circumstanced as to have been able to render them any necessary assistance, had any signal been made for that purpose, as had been previously in all cases agreed on. He gives it as his opinion, that unless the fleet had been continually coöoperating with these lesser vessels, they never could have maintained their position, or continued the blockade. In this opinion his secretary coincides. Another officer, Lieutenant Medi-

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cot, belonging to The Hector, which, with The Warrior, was engaged in the interior line of blockade, in conjoint operation with the actual captors, states, that on the morning of the capture he perceived [*131] from the mast-head the whole transaction distinctly with the naked eye, and could also perceive a cloud of smoke surrounding The Emerald, which he supposed to be occasioned by firing a gun to bring the prize to. The fleet, he adds, were then in sight, coöperating in the blockade. Sir John Orde also thinks, from the circumstance of The Emerald having joined the squadron previous to the capture, that Captain Waller must have been acquainted with the notification made of the intended departure of the prize. The general bearing distance of the frigates from Cadiz lighthouse, by the testimony of these different witnesses, is stated to be from two to four leagues, though sometimes much nearer; that of the ships of the line from seven to eight leagues, or less, as wind and weather permitted. No material deviation from this general statement is to be discovered in the testimony of the witnesses examined on the part of the actual captors, except with respect to the general bearing distance of the fleet from the frigates, which is contended by them to be much greater. Yet, even admitting their statement to be correct, the principle upon which this claim is maintained cannot be affected thereby. Of the general objects of the blockade, one is admitted to be, the detention of all vessels laden with Spanish property, and bound for the Spanish West Indies. A particular object pointed out to the attention of the ships engaged in this service, is the capture of this identical vessel. The capture is therefore expressly embraced both within the general and particular objects of the association or coöperation.

SIR JOHN NICHOL. Was this a blockade of the enemy's vessels of war, or a regular blockade of the port? This distinction is [*132] extremely necessary, and *upon this difference it is probable we shall have to decide the case. A regular blockade is usually and formally notified; it is probable, therefore, had any such existed, this prize might not have attempted to go out of port, through a consciousness of the danger she would incur. Indeed, upon this material consideration the judgment of the court below seems already to have decided, and not without reason. The question in the Prize Court below turned, not upon the blockade, but upon the nature of the property. The vessel was restored, though breaking this asserted blockade, whilst the cargo was condemned.

Whether the blockade was a regular and civil blockade, it is for the court to determine. There appears to have been uncommon

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strictness and attention paid to the examination of all vessels, whether coming into or sailing out of the harbor, and the express orders under which the blockade was commenced, seem to establish the opinion, that so far at least as a trade in Spanish property to the Spanish settlements in the West Indies, (which is the prominent feature in this cause,) it was a regular civil blockade, and that this species of trade was altogether interdicted. So far, therefore, as relates to the condemnation of the present vessel, there can be no unfavorable distinction made whether this were, strictly speaking, a military or a commercial blockade.

Stephen, same side. There are two principal grounds upon which the claim of the asserted joint captors may be, with equal confidence, maintained. First, upon the general principle of coöperation, which cannot be in the least questioned, if the fleet can be proved at the time in sight; and, secondly, upon the letter of [*133] the order issued to the actual captors in common with the rest of the fleet, to detain this particular vessel. With reference to the first, the evidence of Lieutenant Medlicot, of The Hector, is decisive; and though a releasing witness, (and such he appears to be,) is, perhaps, not the least liable to objection, and his testimony ought to be received with caution, yet, in his statement that the fleet were absolutely in sight at the time of capture, he is strongly corroborated by the opinion of a most unexceptionable witness, Sir John Orde, who thinks, from their relative situation, they must have been in sight.

SIR WILLIAM GRANT. He states the ground of his opinion to be, rather the general disposition of the fleet and frigates, than their actual situation. This may give rise to a very material distinction.

It must be granted, certainly, that the general-bearing distance of the fleet from the shore, or rather from Cadiz lighthouse, was liable to great fluctuations, some of the witnesses for the actual captors stating it to be at times forty to fifty miles, whilst those for the appellants generally state it not more than from three to five leagues. The species of support which the frigates generally might derive from this coöperation, it will remain with your lordships, therefore, to decide whether effective or otherwise, as well as the proportion of credit due to the respective witnesses. But the part of the case upon which the appellants are most inclined to rely, is the unity of the enterprise in which all these vessels were engaged. This must be decided upon principle; and here I shall refer your lordships to the decisions in the

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case of *The Harmonie*, *De Boer*, and also in that of the capture of the island of *Trinidad*.¹ In one of these, an enterprise in [*134] which part of the fleet separated *from the remainder, for a time, was not considered a detached service, but rather an extending the arms of the fleet to increase the range of its operation ; while, in the other, though a distinction was judiciously made between the right they might have to share in the capture of the ships, and in the capture of the island, the claimants were admitted to share in the latter, although they had separated from the main squadron which reduced the island, and had not again joined it until the morning on which the final articles of surrender were signed ; and this upon the principle, that they had been originally placed under the orders of Admiral *Harvey*, for the express purpose of reducing this island, which, but for justifiable circumstances, they would have assisted in throughout, and hence, though not in sight at the moment of the first disposition displayed by the governor to surrender, yet their subsequent junction entitled them to share upon the general principle of joint enterprise and coöperation. In opposition to this principle, I only recollect a solitary case which may be cited. In this case, *The Generoux*,² decided in May, 1803, a claim was made on the part of his Majesty's ship, *Queen Charlotte*, to share in a prize taken near Sicily, in the Mediterranean, in consequence of having given intelligence respecting the prize to the actual takers, by which means she was finally captured. The allegation was refused, as it appeared, that though such a notice had been given, the vessels had separated from each other ; and *The Queen Charlotte* had been, at no time after it, within fifteen leagues of the captors. In this instance, however, there existed no previous orders for a union of force, no common object of association or coöperation.

Upon principles of sound reason and judicious policy, it is [*135] highly expedient to shut out litigation *where a coöperation is distinctly proved, merely on the circumstance of the vessels thus coöperating not being in sight, since, if this general plea be often successful, it may induce officers of ships to hazard themselves, their vessels, and even the whole coöperating fleet, by endeavoring to make captures out of sight of the squadron to which they are attached. Considerable caution is therefore necessary in admitting this plea, particularly when it is considered what an extensive latitude is given by acts of the legislature to constructive assistance, whether considered as encouraging the captors, or intimidating the enemy. In this

¹ C. Robinson's Reports, vol. v. p. 92.

² Lords.

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case, there really exists that coöperation and assistance, which the rule of construction only supposes, for the advantage of the service, probably to exist. The cruising of the fleet outside the harbor in the offing, is admitted to have been absolutely necessary to enable the captors to obtain this prize, and, therefore, must be considered actual coöperation. The equity of the case even requires that the claim should be admitted on the part of the remaining blockaders, who were equally, if not more, subject to the harassing inconveniences of a long protracted service.

SIR W. GRANT. It seems to be unnecessary to insist further on the question of fact, whether the fleet were in sight. This part of the case stands upon extremely deficient evidence, and is principally conjectural. The point to which the attention of the court should principally, if not exclusively, be directed, is whether such a coöperation existed as to make the capture in question necessarily dependent and consequent thereon.

**Stoddart* and *Harrison*, for the actual captors. To prove [*136] that such a coöperation did not exist at the time very little will be necessary on our part. Upon the facts of the case already stated, as considered separately from the authorities cited, there seems to remain little doubt that the capture was made without any coöperation as to that precise object. The coöperation admitted is evidently for very different purposes. The principle upon which this claim must fall to the ground may be drawn from the decision of the judge of the High Court of Admiralty in the case of *The Vryheid*,¹ taken in the engagement between *Admiral Duncan* and *De Winter*. The doctrine of constructive assistance was here very fairly tried; and as the claimant's ship, *The Vestal*, was admitted to have been sent to procure the assistance of *Admiral Duncan* and the remainder of his squadron, for the purpose of engaging the enemy, the claim as far as it depended on joint enterprise, may be supposed equally admissible with the present; yet here the allegation was absolutely rejected, and the parties not permitted to go into the proof. In this decision particular reference also was made to the case of *The Mars*,² where a still stronger claim on the principle of joint enterprise, as well as coöperation, was rejected. In direct violation, then, of the authority of this judge, you are now called upon to extend the effect and meaning of constructive assistance, so as to include the present

¹ *Robinson's Reports*, vol. ii. p. 21.

² *Lords*, 1760.

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claimants. The capture, it is contended, was made in compliance with the order of Earl St. Vincent to continue the blockade, and be particularly attentive to intercept all enemy's vessels passing to or from the Spanish West Indies and Cadiz. This cannot be supposed to include the detention of a Danish vessel laden with property documented *as neutral. Such was the prize. This order refers not to her. The order, or rather notice, by Sir John Orde, never reached the captors; it, therefore, forms no part of the case. In the case of *The Generoux*,¹ the claim of joint capture was supported on several distinct grounds—the intelligence given respecting the prize to the actual captors, conjoint enterprise, and actual coöperation. The fleet had been so disposed, that the enemy with her convoy could not possibly get into Malta; and means were taken to drive these vessels into the hands of the actual captors. Thus these vessels appeared to be acting under the same commander, and coöperating for a specific purpose, of which the claimants were the absolute apprizers, yet your lordships, without hesitation, decided against the admissibility of the claim. In the case of *The Kinders Kinder*,² although *The Defiance* was only five leagues from L'Aigle at the time of the capture, which was made without chase, and in a thick fog, the claim was also considered without sufficient foundation. In *The Vrow Constantia*,³ decided in February last, it was held, that a claim to joint capture could not be supported, except the capture arose out of the express object for which the parties had been associated or united. As far, therefore, as authority can go, the claim of the present parties, admitting the analogy, is already decided against upon the clearest principle. Upon the matter of fact we have to object, that the blockade was never intended to be a commercial blockade. With respect to this particular vessel, it is said, however, to have embraced that object. The notice mentioned is the sole proof of such an intention. Captain Waller does not admit he ever received any intimation of this intention. Yet, even if he had, the case of *The Generoux* would have overthrown *any claim on the principle of previous intelligence, as in that instance extraordinary notice had been given, and considerable co-operation afforded. A salvage interest, which is mentioned in the case of *The Franklin*,⁴ had been set up by a British ship on the circumstance of apprising a Spanish vessel (bound from New Orleans to Bordeaux, and ignorant of the existing hostilities) of the danger she was

¹ See page 134.

² Lords, 1807.

³ Lords.

⁴ Robinson's Reports, vol. iv. p. 150.

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about to incur; here your lordships thought fit to decide against admitting the claim,¹ on the authority of which judgment it has since been held, that the claim of military salvage cannot be sustained. It is altogether unnecessary to argue this case on general principles of policy or the interest of the service; it must be too apparent, that to admit these claims lightly would be injurious to the interests, destructive of the characteristic ardor of the navy, and productive of endless futile litigation. There would, in such a case, be no end to claims of this description; and the court might, with equal propriety, extend the right of joint capture in every instance to the whole collective navy, and thus take away the strong stimulus of individual interest, which it has hitherto been the primary object of legislative enactment to excite and render secure. It is only necessary to add the circumstances attending this vessel's adjudication, and the length of time which afterwards transpired previous to any claim introduced on the part of the appellants. This vessel was carried into Gibraltar immediately after the capture, and restored; the cargo, on further proof, was condemned. No claim whatever was then set up of joint capture, although the whole fleet were apprised of the intended adjudication. Nor was it until upwards of three years afterwards that such a claim was set up by The Warrior and Hector as having been *in sight; and more than five years after that [*139] this claim was introduced on the part of the fleet, as jointly coöperating. Several, however, of these latter claimants have since, in despair, withdrawn their claims. These considerations, added to the strong authorities cited against the constructive principle contended for, will no doubt satisfy your lordships that no such claim can fairly be maintained on either motives of policy or strict equity.

Swaby in reply stated — he was willing to drop altogether the term blockade in the present instance, and merely denominate it a service whose principal object appeared to be the detention and bringing up of all vessels for examination, in which all the several claimants were coöperating by express orders. The cases alluded to were not analogous. In The Vryheid the claimants were employed on a detached service. In The Generoux an order had also been issued for a detached service; the body of the fleet continually changing day after day, so that no distinct claim could be fairly made out for any. In The El Navarro, the claim to salvage was justly rejected, as not founded on the only proper and general ground of such application

¹ El Navarro. Admiralty, Nov. 11, 1793. Lords, July 18, 1795.

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pro opere et labore. No such averment could be there made with truth. The only remaining question before the court, therefore, was, whether this capture was a separate service, independent of the purpose of general association. The lateness of the introduction of the claim for the remainder of the fleet, he added, was merely owing to the inattention of the person intrusted with that charge.

JUDGMENT.

SIR W. GRANT. Upon the authority of the cases which [*140] have been cited, a principle appears to have *been established perfectly just and consistent with the interests and welfare of the service. Where a capture is strictly made in association, the parties so associated shall be admitted to share. We are now called upon to extend this principle to a very considerable length indeed, and give an extremely vague, constructive meaning to the term association. We cannot, however, go the length necessarily requisite to include the present claim. There certainly appears to have been a joint enterprise undertaken between the captors and the appellants; but this was expressly limited to a precise object, namely, a military blockade. The proceedings, therefore, in the court below turned not upon a breach of blockade, but upon the question of property. A breach of blockade was not imputed to her; she was, therefore, restored as neutral property. The cargo alone was condemned, and this upon further proof, as to property solely; which could not have been the case, had the coming out of port been part of the crime imputed, for in fact this was admitted by the parties. The sole question upon which this case must be decided, and which has, therefore, in the course of the argument, been principally attended to, is whether it is sufficient to establish a right to share on the part of asserted joint captors, that the capture shall take place during the time of a joint enterprise. Upon this we are decidedly of opinion, that it is not sufficient a joint enterprise shall exist at the time, except it expressly refer to the capture in question, or, in other words, that the capture grow out of the purpose and object for which the parties have been united, and be the joint produce of an actual coöperation, and the object of union. We, therefore, confirm the sentence appealed from, and reject the claim on the part of the remainder of the fleet.

The Little William. 1 Acton.

* LITTLE WILLIAM, Brown, master. [*141]

November 24, 1809.

Blockade of the Elbe. Instructions having been given by the owners to inquire of the vessels cruising off the Eyder respecting the existence of the blockade. Further proof admitted, to ascertain the actual intention of the master in approaching so closely the mouth of the blockaded port.¹ Innocent intention established. Ship and cargo restored. Appellants condemned in costs of both courts.

THIS vessel, with her cargo, was, on the 23d November, 1807, condemned by the judge of the High Court of Admiralty, as sailing in wilful violation of a notification of his Majesty's principal secretary of state, issued on the 11th March, 1807, declaring the rivers Elbe, Weser, and Ems in a state of blockade. From this sentence the master, claimant of the ship for Jacob Sperry, of Philadelphia, and George Salkeld, merchant, of London, claimant of the cargo, as the property of several American merchants, appealed. On the 21st November, 1808, the claim of William Lyman, Esq., consul general of the United States of America, was exhibited for the ship and cargo, as American property. An appearance on behalf of the captor was accordingly given, and the appeals assigned for sentence.

* Dallas and Jenner, for the captor. The sentence of condemnation, passed on this vessel and cargo in the court below, appears to have been grounded as well upon the numerous culpable inconsistencies in the oral and documentary evidence exhibited in the cause, as upon that established principle of general law so repeatedly recognized by an uniform series of decisions both in this and other courts of prize, that no neutral shall be permitted, after having been apprised generally of the existence of a blockade, to sail to the mouth of the blockaded port, for the purpose of ascertaining there whether such blockade actually exists. Were such a practice permitted, the immediate consequences would be, that neutrals would be too strongly induced to forget moral obligation, in the prospect of increased advantages arising from a trade with interdicted ports, and that a system of fraud and artifice would be resorted to, for the purpose of eluding the vigilance of blockading squadrons, and slipping into such ports in the darkness of the night, or under other circumstances favorable to a similar design. The

¹ [See The Betsey, 1 C. Rob. 332.]

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master states, in his deposition, that the destination of this vessel was for Hamburg, unless that port were blockaded, in which case she was to proceed to Tonningen. The mate and seamen examined say, only, that they had been informed by the master that such was her destination. This circumstance certainly induces suspicion, as the letters on board are all found directly addressed to persons residing in Hamburg, and the vessel herself is consigned to Mr. Vogel, a merchant of that city. One of these letters mentions, that the writer (one of the shippers of this cargo) "learns with great regret that a blockade has been imposed by the English on the rivers [*143] * Elbe and Weser, as it is probable they will not relax in pursuing this mode of retaliation for a considerable length of time." No doubt, therefore, exists that the parties were acquainted with the existence of the blockade, and even with the probability of its continuing much longer than after the arrival of this vessel in Europe. In the preparatory examination of the master, he does not scruple to state that the whole of the papers on board, relating to the ship, were delivered up to the captor after the capture; yet in his subsequent affidavit, in support of the claim, he, alluding to a certain letter to be found in the papers in this cause, purporting to be the letter of instructions from the owner, Sperry, to him, respecting the management and conduct of the ship, avers that he received this letter from Sperry at the time he commenced this voyage; that it was on board when the capture was made, but that he did not deliver it up with the other ship's papers, conceiving it unnecessary so to do. This must be considered an instance of the grossest fraud in an experienced master. Upon this imperfect evidence the judge ordered the cause to stand over, in order to give time to the master to explain the nature of the instructions he had received, with respect to the place at which the inquiry was to be made, relative to the actual blockade of the river Elbe. Two affidavits were introduced: The first sworn by the master, in which he deposes that he had on two former voyages, with a similar contingent destination to Hamburg, if not blockaded, sailed with orders to obtain the necessary information, as to the blockade of the Elbe, at Heligoland, where he was under the necessity of calling, at all events, for a pilot, that being the only place of procuring one, either for the [*144] * Elbe, the Weser, or the Eyder, as the insurance is otherwise void in case of accident, such navigation being considered pilot's water. In both these voyages he proceeded to Heligoland, near which he fell in with British cruisers, which, after indorsing his papers, permitted him to proceed to Tonningen, Hamburg being then also blockaded. And, referring to the letter of instruction

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before mentioned, wherein the owner writes — “ If you should ascertain and obtain permission to proceed to Hamburg, from the cruising vessel at the entrance of the Eyder, you will please proceed ” — he deposes that he believes the same arose from the owner’s having been informed at Philadelphia, (where it was generally known at the time of The Little William’s departure from thence,) that leave had been given, by one of his Majesty’s ships forming the blockading squadron, to the American ship Temperance to proceed to Gluckstadt, a Danish town on the Elbe, notwithstanding the blockade of the said river. He believes it was his owner’s intention that he should first proceed to Heligoland, for the purposes mentioned ; nor should he have attempted to proceed to Hamburg, unless he had received information there that no danger would be thereby incurred, and that the blockade had been relaxed or discontinued. His course, he observes, whether to Hamburg or Tonningen, was the same, until he arrived at Heligoland. The second affidavit is made by Sperry, the owner’s brother, who states therein, that being at Hamburg, on the commercial concerns of his brother, he received advice that this vessel would shortly sail for Tonningen ; whereupon he began to prepare a return cargo for her, which he despatched partly by land and partly by water to Tonningen, where it *remained [*145] until, being disappointed by the vessel’s not arriving at Tonningen, he put these goods on board other American vessels. No vessel in which his brother was concerned had, during its continuance, attempted to violate the blockade of the Elbe ; and, from inspecting his brother’s letter, he states he is perfectly satisfied it was his brother’s intention to direct the master to proceed to Tonningen, unless he should learn at the mouth of the Eyder, from any English vessel cruising there, that the blockade of the Elbe was raised ; and that finally, in all the various shipments his brother had made to that part of Europe, no vessel in which he had any concern had ever broken the blockade of the Elbe. On this parol and written evidence the court below, having maturely deliberated, condemned the ship, with her cargo, as sailing to a port in blockade, with intent to ascertain, at the mouth of the blockaded port, whether such blockade in fact existed. The propriety of this sentence will appear from a review of the evidence exhibited in the cause. For a considerable time the master admits he had been engaged in superintending different vessels, in which the owner of the ship in question had laden goods, all which vessels, he admits, sailed with similar contingent destinations, and continued to prosecute that destination until they were warned by British cruisers not to attempt to enter the Elbe. The present voyage is admitted to be the third of the kind ; and there can be

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little doubt entertained, from the perseverance displayed in this sort of uncertain destination, that, had circumstances proved favorable in any of these voyages, the master would have endeavored to defeat the intention of the blockading squadron, and consulted the secret

wishes and obvious interest of the proprietor. The principle of law, with respect * to blockaded ports, is perfectly well defined and generally understood. On this principle, any vessel sailing from one European port to another, knowing it to be in a state of blockade at the time of her departure, would necessarily be subject to condemnation. A relaxation of this principle has been considered expedient, as to American vessels, on account of their extreme distance from the seat of war, and the impossibility of obtaining immediate information of the actual state of the ports of Europe at the time of setting sail. They are, therefore, permitted to proceed with a contingent destination for such ports. But it has always been held that the master must procure that information, with respect to the actual existence of the blockade, which is necessary to regulate his determination, before he arrives at the mouth of the port supposed to be in a state of blockade. And every deviation from this judicious and necessary restraint, imposed on vessels sailing with contingent destinations, has been uniformly punished by condemnation. It is further required that, in all contingent destinations, the ship's papers must fairly and explicitly state the contingency itself. The first fact to be complained of in this case is, that there has not been a fair disclosure of her destination in the ship's papers. In the instructions the vessel is consigned to Vogel, residing at Hamburg; and the master directed to ascertain, from the cruising vessel at the mouth of the Eyder, whether the blockade in fact existed, and also to obtain permission to enter the Elbe, if blockaded. On the face of these instructions, therefore, it will evidently appear the master was to do that which, in point of law, he could not do without subjecting the vessel to condemnation, since the

cruising vessel mentioned can mean no other than one of the vessels engaged in maintaining that blockade. That such was the intention of the owner is distinctly to be inferred from the affidavit of his brother, Frederick Sperry, to whom this vessel was in part intended to have been consigned. This affidavit, though introduced for the purpose of explaining favorably the instructions to the master, admits the fact that the inquiry was to have been made at the mouth of the blockaded port. And notwithstanding the master's positive and reiterated assertion that it was absolutely necessary he should call at Heligoland for a pilot as well as to obtain every possible intelligence respecting the actual state of

[* 147] * the vessels engaged in maintaining that blockade.

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the port of Hamburg, the affidavit of Mr. F. Sperry makes no mention whatever of this asserted necessity for touching at Heligoland, though all parties must have been aware how extremely material it might prove to establish this point. The letter of the owner to Vogel cannot but have considerable weight in deciding what was the intended destination of this vessel. In this letter he consigns to his care the interests of the vessel, and in express terms mentions that all passengers from Hamburg to Philadelphia shall pay at Hamburg each thirty guineas, adding, "the whole primeage of 5 per cent. from this to Hamburg you will please to pay the captain, and from Hamburg here he is to have a similar allowance on the whole freight payable here." Upon the admission, therefore, of the claimant and others equally interested in the success of this voyage, it must be inferred that the real destination of this vessel was for the port of Hamburg, with an intention to elude the blockading squadron if possible, or if unsuccessful in this attempt, she was, through constraint alone, to alter her course to Tonningen. No satisfactory excuse or apology can be offered by the owner for the instructions which he himself *gave to the master, since, were it actually the intention of [* 148] the owner that such inquiry should have been made at Heligoland, there would have been in this instance no necessity for the vessel's bearing up for the Elbe. All uncertainty would have been removed before she had proceeded so far on her voyage, and acting upon the authentic information to be derived there, no danger could have arisen to the vessel had it been in the contemplation of her owner to prosecute a legal and justifiable voyage. With respect to the claim interposed by the American consul, it is presumed no such claim can now be argued, as it will be found to refer to various documents not now before the court, but which have been very irregularly introduced along with the papers in this cause, and printed in the form of an additional appendix.

Addams stated that he had been applied to on the part of the consul of the American government, to support a claim for this ship and cargo as the property of American citizens. The papers alluded to had been introduced for the purpose of authorizing and supporting this application.

By the COURT. All these different goods, together with the vessel itself, have been each specifically claimed as the property of various individuals. No other claim can, therefore, be heard with respect to this property. It seems rather as if the claim were necessary for the purpose of sanctioning the introduction of these papers very irregularly.

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Arnold, for the claimants. It is a striking feature in the present case, that this vessel being captured off the Start Point, [*149] * nothing can be urged against her except a possible intention to defeat the purposes of the blockade. On this presumption, which is certainly one that should not be lightly taken up, the whole argument for the captor is founded. The peculiar situation of neutrals in the neighborhood of the rivers Elbe and Weser, during different periods of the war, has furnished a principle upon which the orders of His Majesty in council respecting such neutrals have usually proceeded, and upon which, no doubt, the court will now be disposed to act with respect to the vessel claimed. Several of the orders issued at various periods during the present war relative to the blockade of the Elbe state each as a preamble, that such order has been considered necessary on account of the occupation of the neighboring towns and the banks of this river by the enemies of Great Britain. These orders for a blockade have been temporary, and in general withdrawn as soon as the cause ceased and the French troops withdrew from the shores of that river. No intention, therefore, appears on the part of His Majesty to restrict the trade of Hamburg: no such object was in the contemplation of any of these prohibitory orders, and we find that the merchants of Hamburg were permitted, notwithstanding, to carry on their trade, so far as it did not interfere with the direct purpose of the blockade. Even this restriction was removed when the cause ceased; but as soon as it recurred, the blockade was renewed and made to include all the ports from these rivers to the harbor of Brest. Yet even in pursuing this rigorous system with respect to the trade of these neutral cities, a modification or relaxation took place, which removed all unnecessary restraints, and from the frequent instances displayed of a disposition on the part of his Majesty's government to serve these [*150] * distressed people, there can be no doubt entertained, that could their trade be carried on in any other way that might be pointed out, which should not have interfered with the known purposes of Great Britain for cutting off the resources of the enemy, such mode of carrying on their trade would have been permitted, if not protected and encouraged by this country. This well known relaxation, which permitted the communication between these towns along the Flats or Watten, naturally leads to this inference amongst others, that for an American to continue his connections with Hamburg was not thought inconsistent with the general views of Great Britain, or hostile to the purposes of the blockade. The case of the claimants cannot, therefore, be injured by admitting that the general nature of their trade was direct to Hamburg, and that in the present instance it

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was their intention to have entered the port of Hamburg, though actually blockaded, had any safe-conduct or permission been granted by persons authorized, as they had been informed was the case when a similar application had been made by the American ship Temperance, for permission to proceed to Gluckstadt on the same river. The circumstance of the vessel's being consigned to Vogel, residing at Hamburg, cannot fairly be said to induce a suspicion that her destination was absolutely for that city. It seems to have been the intention of the parties to have innocently traded with their accustomed consignee, and should the vessel be ultimately obliged to enter the port of Tonningen the concerns of these parties would probably have been as judiciously managed as by a consignee at Tonningen, since the distance between these towns is inconsiderable, and the communication frequent. The general rule of blockade has been fairly laid down, and the exception in favor of American neutrals seems to be founded ^{*}on the increased hardship they [*151] must labor under were no contingent destination permitted, as from their extreme distance from the seat of war the blockade must last longer as against them than European neutrals, nor could they ever avail themselves of those frequent short interruptions of the blockade, of whose commencement they could only be apprised at the moment they had concluded. To obviate the numerous frauds to which it was apprehended might be resorted to, were the permission to sail with a contingent destination not accompanied with definite rules for the purpose of obtaining accurate information as to the state of the port supposed in a state of blockade, it is required that vessels of this description shall make inquiry and ascertain the state of such port at a safe and permitted place, and in a safe and permitted manner; and to show that they entertain no disposition to elude the blockade, it is particularly necessary that such inquiry shall not be attempted to be made at the mouth of the blockaded port. This restriction is confined to the mouth of the port blockaded and to the blockading squadron as at its mouth; and when it is required that neutrals are not to inquire of the actual state of a port supposed to be in blockade, at its mouth, it is not intended to make the inquiry of the blockading squadron in itself unlawful, or a sufficient cause for the condemnation of the vessel. Circumstances might arise to render this almost unavoidable, or at least perfectly justifiable; for it cannot be contended, had the blockading squadron been blown off by stress of weather, or been compelled on any other account to leave that particular station, and during such cessation of any actual blockade this vessel had fallen in with the squadron and made this inquiry, ^{*}that it would involve her in any criminality or subject her [*152] to condemnation.

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On the particular circumstances of this voyage it is necessary to observe, no concealment appears to have been attempted. The views and wishes of the parties are displayed with more than usual candor and explicitness. It is admitted the general course of their trade was for Hamburg, and that such would have been their wish in this instance, had not untoward circumstances prevented it. The private letters found on board, and all the bills of lading, mention her destination to Tonningen. This is also found in the letter of instructions which it has been said was intentionally and fraudulently concealed. The master disclaims any such intention, and in this he is entitled to some credit, since he might easily have suppressed it altogether, had he considered its production injurious to the claim made. The fair inference is, that he acted ignorantly in neglecting to deliver it up, for this letter is, perhaps, the best possible document in the case to prove the real intention of the principal owner to be perfectly consistent with the neutral character. Mr. Sperry there writes, "I wish you to proceed with all possible despatch for Tonningen, and on arrival forward my letter per express to Mr. C. T. Vogel, Hamburg, to whom you are consigned, &c. If you should ascertain and obtain permission to proceed to Hamburg from the cruising vessels at the mouth of the Eyder, you will please proceed, but on no account attempt it unless you are well assured the blockade of the Elbe is raised." The master, by not at first presenting this letter, evidently

[*153] betrays no great anxiety to give a favorable color or complexion to his case, since *there cannot possibly be any more satisfactory proof exhibited of the upright intention of the owner. In consequence of the claim made by the master for this vessel as the property of Mr. Sperry, all the papers which could be adduced in its support were anxiously sought for, and this letter was voluntarily introduced by the master, who, in his affidavit, states that he considered it unnecessary to produce it at the time of the capture, probably considering it rather as a private communication between his owner and himself than a ship's paper. This may be attributed to an error in judgment, (for erroneous it certainly is,) but should not be deemed an omission deliberately resolved upon for the purposes of fraud.

From the annexed affidavits it is to be collected that the usual custom of the trade has been to call at Heligoland and take a pilot. That, as connected with the insurance of the vessel, it was absolutely necessary to secure the owner against subsequent accidents. Here it was probable he would be provided with such information as might remove all doubt from his mind respecting the course he should pursue, whether for Tonningen or Hamburg. It appears,

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however, to have been understood by all parties, that he should as he approached the Eyder ascertain from any British vessel cruising there, whether he might obtain permission to enter the Elbe from the commander supposed to be upon that station, as such permission had before been granted to the American ship Temperance. To pass the Eyder was necessary. Therefore, any inquiry made there was perfectly lawful, and so it must have been had even the vessel of which it was intended the master should have made the inquiry at the entrance of the Eyder been one of the squadron blockading the river Elbe. The circumstance ^{*}of her being [*154] at the entrance of the Eyder would have rendered any such inquiry by a vessel bound for Tonningen perfectly legal.

BY THE COURT.

SIR JOHN NICHOL. It has ever been my wish to avoid as much as possible all interruption of counsel in the course of argument; but in the present instance it will not be considered immaterial to the interests of the parties to observe, that from the letter of instructions itself, which I now hold in my hand, and have perused with attention, it appears the inquiry is directed to be made of the cruising vessels off the Eyder, not the cruising vessel. It is put in the plural, whilst in the court below it is observable it was taken to be in the singular, and a considerable part of the argument turned upon this assumption. There is a want of accuracy in the handwriting, which to a casual observer might leave it doubtful whether it were the singular or plural, but from comparing this termination with other similar ones, I am clearly of opinion it was intended for the plural. This may perhaps shape the question more favorably for the present argument, and perhaps serve to show that it was not in the contemplation of the claimants the master should make the inquiry off the mouth of the blockaded port.

Dallas. The direction, however, is confined in the one case or in the other to the cruising vessel or vessels on that particular station. It remains, therefore, with the court to determine how far such an intention may affect the interest of the claimants. 'Tis certain the cruising vessels off the Eyder cannot be at the same time considered one of the blockaders of the Elbe, ^{*}since one is [*155] distant from the other twenty miles, yet it might be one of the ships employed on that station for the express purpose of the blockade of the Elbe. For it is not the circumstance of inquiry at the mouth of the blockaded port which solely furnishes the principle upon which condemnation should ensue. Taking the instruction,

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therefore, in the plural number, it will be advisable to examine with a considerable degree of caution, whether the master's former experience of the manner in which this blockade was usually conducted, might not have led him to attempt, under the present vague instructions, what he must be aware was in itself perfectly illegal and inconsistent with the neutral character.

Stephen, also for the claimants. On all questions of fraud the attention of the court should be particularly drawn to the investigation of what may be the actual interest of the parties. When it is the interest of the parties to do that which is in itself legal, and asserted to have been intended, all suspicion of intentional fraud should be removed. At least it must be in candor admitted that there exist no inducements for fraud, but every inducement to the contrary. In reference to the peculiar nature of the blockade of Hamburg it may be remarked, that there has not at any period existed the same strong inducements to violate this as to violate the blockade of other ports. All possible allowances were constantly made for the inevitable distress of these neutral cities, relaxations were made in their favor, and a very considerable trade permitted to be carried on in an indirect way across the Watten. The only object a neutral merchant could have in view by directing a vessel to elude the blockading squadron and enter the Elbe would be to obviate the necessity of the subsequent *interior navigation, which was the only mode permitted for the conveyance of the cargo into the river Elbe, had the master continued his course to Tonningen. The temptation is, therefore, comparatively trifling, and inadequate to the risk and danger likely to be incurred. Such has been the beneficial effect of this relaxation that there are hardly any instances wherein this blockade has been broken. And when the distressed state of these merchants is taken into consideration, whose interests have thus been sacrificed to the British belligerent rights, all possible indulgence should be given them in permitting these species of contingent destinations, and no rigorous rule of interpretation should be applied to letters of instruction respecting these voyages, when so many circumstances conspire to make these instructions loose and indefinite. In the case of *The Betsy*, Goodhue,¹ the less rigorous rule of construing the instruction given was adopted, and the vessel restored, though sailing under circumstances nearly similar. Tonningen had during this period become an *entrepot* or species of warehouse for the trade

¹ 1 Robinson's Reports, 332.

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of Hamburg. There was no consumption for the various goods daily landed in that port. Hence the greater necessity existed for the owner of this vessel to require that the master should make all possible inquiry to ascertain whether he might safely enter the better market; for had the blockade been removed previous to his arrival in Tonningen, his situation would be peculiarly unfortunate to find himself pent up in Tonningen without a hope of a market, whilst others had availed themselves of an opportunity it was also equally his interest to improve. Indeed, in the present case, the claimants are entitled to much more consideration from the court than in that of *The Betsy*, for at the period of time in which this voyage was undertaken, the master knew *that he durst not [*157] enter a British port to make any inquiry according to the enactment of the Berlin decree, which proscribed any such entry under the severest penalty. The instructions were founded on a twofold contingency, either a cessation of the blockade, or a permission granted to enter notwithstanding its continuance. Upon the possibility of either, it was but fair and just the neutral merchant should calculate, for the latter had been known to occur in different instances, both with respect to the port of Havre and Hamburg. Whether the contingency were expressed in the bills of lading or only in the other papers found on board is perfectly immaterial, since from the nature of this voyage it appears she must necessarily arrive first at neutral territory, which is all that is required to sanction her making the inquiry. The strict meaning of the restriction concerning the place at which inquiry may be legally made seems to amount to this, that no neutral vessel shall, on pretence of making such inquiry, be in a place where otherwise she was not entitled to be. If speaking to a British cruiser in those seas be criminal, for the purpose of ascertaining the fact, the natural inference must be, that should no information be obtained in the neutral territory on the subject, a vessel must proceed absolutely for the port supposed in blockade at the hazard of capture and condemnation, or direct for the other port, let its distance be what it may beyond that into which it might perhaps have entered with safety had its real state been ascertained. A contingent destination would in this instance be deprived of almost all its advantages. It has been argued that a vessel thus circumstanced has no right to proceed to inquire in a more distant port of the actual situation of a nearer *port [*158] supposed to be in blockade. Where is this assumed principle to be found? No such rule exists. Nor would it be consistent, since the act of the vessel's proceeding beyond the port proves most distinctly that she had no intention to enter it, unless she should

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first ascertain it might be done without hazard. The suspicion of any intention to violate the blockade is in this case removed, and the instructions delivered to the master appear to point out to him that line of conduct in pursuing which it was supposed he must have acted with the strictest propriety. If a doubt can still be entertained on the nature and tendency of these instructions, the parties it is presumed will be permitted to introduce further documents in explanation.

Dallas, in reply. In questions of fraud the same inference is to be drawn from the proof of an intention to commit as from the actual commission of the fraud itself. The intention here is to be collected from the various circumstances of this particular voyage. It has been admitted first, that this vessel could not inquire at the mouth of the blockaded port; and secondly, that she could not sail under a contingent destination, if that contingency were concealed or endeavored to be concealed, without hazarding her condemnation. On these admissions the present case may easily be decided. If the destination of a vessel be suppressed, it has generally induced such suspicion as led to her condemnation, or at least to exclude the owner from giving any explanation in justification of her delinquency. The case of *The Betsey* differed from this in the material circum-

stance of the distinct and explicit avowal of the destination [*159] in contingency. *Here the same indulgence cannot, therefore be extended, for the most material document to prove the contingent destination was for some time suppressed. The master can take no great credit to himself for its voluntary production at last, since it has been introduced for the purpose of making out a case for the claimant, and should, in every point of view, be looked upon with suspicion. To direct any inquiry to be made of a blockading squadron off a port in blockade, is, in effect, to inquire at the mouth of that port, whether the inquiry is made or not, and must be followed by all the legal consequences resulting from an actual inquiry. Here, then, it must be considered, that this vessel made, or would have made, such inquiry; for, by the mouth of the port blockaded, is meant not only the portion of sea inclosed between the extreme points of land, but, with a more extended latitude, that space or line in which vessels usually cruise for the purpose of intercepting vessels either going in or out of the port. The cases of *The Spes* and *Irene*,¹ includes the principles upon which this case must be decided;

¹ *Robinson's Reports*, vol. v. 76.

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in the judgment upon these cases, the learned judge lays it down expressly in reference to American vessels sailing under contingent destinations, that "the neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say, if you do not meet with the blockading force, enter; if you do, ask a warning, and proceed elsewhere;" and referring to the indulgence extended to Americans during the last war, permitting vessels to sail from America with a contingent destination, which contingency was to be regulated by the information they should receive on arriving in Europe; he adds, "But *in no case was it held that they might sail [*160] to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. The act is to be taken as completed by the attempt. If the owners are innocent, they must in law be bound by the indiscretion of their agent." And so exactly similar are the instructions given in the present case and in those of The Spes and Irene, that the terms of the judgment applying to the particular and minute circumstances of those two cases, are strikingly applicable to the present, where the learned judge adds: "This is not a case of persons suffering merely by the indiscretion of their agent. The owners here are directly implicated by the instructions which they themselves have given." Such an authority, must press with peculiar weight upon the court, when the exact similarity of the circumstances of these cases is so strikingly apparent. The justification which has been attempted, upon the principle of the restrictions imposed on American vessels from entering the ports of Great Britain by the Berlin decree, cannot possibly be admitted, since any such admission would have a direct tendency to give effect to the hostile measures of the enemy.

The court pronounced for the appeal, and leave was given to bring in affidavits to explain the instructions given by the owner to the master.

Dallas suggested that leave should also be given to the captors to offer any explanation upon the subject. If the owner's intention could be proved by the captors to be criminal, he contended condemnation should *follow. Nor was it immaterial to [*161] ascertain whether the vessel stationed off the Eyder was actually one of the blockading squadron.

BY THE COURT.

SIR WILLIAM GRANT. I cannot see that any material consequence

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would result from any further investigation on that particular point. The doubt now existing in our minds arises upon the ambiguity of the instructions to inquire of certain vessels. To direct the inquiry to be made off the Eyder, appears, under the peculiar circumstances of this blockade to be fair, and unattended with any suspicion that fraud was intended. It is upon that part of the instructions which relates to the cruising vessels, or vessel, as it was taken in the court below, that we are anxious to obtain more complete information. Here the ambiguity rests.

The attestations of Joseph Michael and Edward Killey,¹ of Philadelphia, mariners, were produced in court, stating, that they had been long acquainted with the course of trade to the rivers Elbe and Eyder; that vessels in either of these voyages were delivered on their arrival off Heligoland to the Heligoland pilots, and by them to the river pilots of the Elbe and Eyder; that British cruisers are frequently met with on the west side of Heligoland, near to the island, which are not of the blockading squadron, when Hamburg is blockaded. That Heligoland was considered the entrance of the Eyder, and all vessels must steer for it proceeding either to the Elbe or Eyder.

[*162] * To these attestations was added that of the owner, Jacob Sperry, declaring the only instructions given to the master were those contained in the letter formerly mentioned. It was his intention the vessel should proceed for Tonningen, unless the master should learn, not from report or rumor, but from British cruising vessels, (not of the blockading squadron of the Elbe,) that the blockade had been removed; referring for corroboration of this attestation to his letters to his brother and the master, in which he writes that this vessel was to proceed to Tonningen, unless the blockade of Hamburg should be raised and occasion a change of voyage. Copies of several other letters were adduced from his letter-book, to the same effect, stating that her destination was for Tonningen.

SENTENCE.

Upon these additional proofs the court pronounced for the appeal, condemned the appellants in the costs of both courts, and restored the ship and cargo.

¹ January 25, 1810.

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* THE DISPATCH, M'Kever.

[*163]

December 7, 1809.

Blockade of Bremen. Objected, that an American vessel sailing from America, with knowledge of the actual blockade of the port for which she has a contingent destination, should, in her papers, disclose, in explicit terms, the place at which the inquiry was intended to be made relative to the fact of its continuance.

Overruled, it being ascertained that Heligoland, whence pilots were always procured to secure the insurance of vessels entering that harbor, was the usual place for vessels to make inquiry.¹

Appellant condemned in costs.

THIS American vessel, captured on a voyage from Philadelphia, with a contingent destination to Bremen, if not blockaded by a British squadron, had been restored by a decree of the High Court of Admiralty. From which sentence an appeal was prosecuted by the captor, Charles Chant, Esq., commander of the private ship of war *Betsey*.

Arnold, for the owners. This vessel sailed under charter-party for the port of Bremen, in June, 1807, subsequent to advices received by her owners of the blockade of that port by the British.² Notwithstanding such information, the owners, in conjunction with the merchant to whom the vessel had been chartered for this voyage, calculating on the probability of a cessation of the blockade prior to the arrival of the vessel at her destined port, concurred in the expediency of giving her a contingent destination, so that should the port of Bremen continue in a state of blockade on arriving in Europe, the master had orders to make the river Jahde, or even Tonningen, should the blockade extend to the Jahde. The proof of property is admitted to be satisfactory. The sole question, therefore, upon which the court will have to exercise its judgment will be, whether this vessel was, at the time of capture, in the prosecution of a legal voyage. A question which, from the peculiar circumstances under which this voyage was undertaken, "it will not be very difficult to decide; especially when it is recollect how strongly applicable the arguments and principles so successfully laid down in the case of *The Little William*,³ are to the situation in which the respondents

¹ [The *Betsey*, 1 C. Rob. 332, note.]

² See Notification of March 11, 1807.

³ Page 141.

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are now placed. The justice and necessity of permitting to American vessels a more extended latitude with respect to a contingency of destination, are sufficiently obvious; and, as the conduct of the owners in this case will, upon examination, be found strictly consonant with the spirit of this relaxation in favor of neutrals so cut off from immediate intercourse with the seat of war, or intelligence with respect to the changes which so frequently occur in the operations of the belligerent powers of Europe, this court will doubtless be equally disposed as the court below to grant them all the benefit which it was intended the fair neutral should derive from this relaxation of the strict principle of national law. In the conduct of the respondents, as well as the ship's papers, and the owner's instructions, every thing is characteristic of candor and integrity. The charter-party made between the owners and Mr. Wotherspoon, who had undertaken to provide the vessel with freight, both in the outward and return voyage, discloses the contingent destination of the vessel. The goods laden by different shippers are indifferently described in the respective bills of lading as going to Bremen or the Jahde. The letter of instructions to the master, specifically points out the contingent destination, as well as the circumstances which were to regulate that destination. The great object of the different parties, who, it seems, all concurred in the expediency of these precautions, appears to be a desire to place their goods under the management of a particular house at Bremen, to which they had been strongly

[*165] recommended as safe and fit "persons to become the consignees of their goods. Whether, therefore, the vessel put into Bremen, the Jahde, or even Tonningen, where it was decided she should unload her cargo, did the blockade, of which they had received advice, extend to both the former ports, this desirable object would have probably been effected, as the distance is not very considerable between them. Under these circumstances, the judge of the court below, on the first hearing, thought proper to direct inquiry to be made, as to the verbal communications or instructions the master might have had on this particular subject with the shipper or owners, previous to his departure for Europe. An affidavit was, in consequence, admitted, in which the master stated, That, before the formal and regular charter-party was signed, information was received at Philadelphia that the Weser was blockaded; whereupon there were several consultations between Mr. Wetherspoon and the owners of the ship, respecting the intended voyage, in which it was considered that the blockade might be raised before the ship arrived in Europe, and it was therefore agreed that the ship should go to Bremen, if not blockaded, but otherwise to the river Jahde; upon which the

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master observed that the Jahde might be also blockaded, and, wishing to know what he should do in that case, Mr. Wetherspoon replied that such blockade was highly improbable, but that if it did take place he must go to Tonninen; and it being also required how it should be ascertained whether the Weser continued to be blockaded, the master observed, as the fact was, that he must, at all events, go to Heligoland for a pilot, and that he should there ascertain the fact, and act accordingly; it was perfectly understood between himself and the other owners of the said ship, and

* Mr. Wetherspoon, that the said ship was to proceed direct [* 166] to Heligoland, for the purpose of taking a pilot, and ascertaining whether or not the Weser continued under blockade; and that, in case such blockade had been raised, he was to proceed to Bremen, but otherwise he was to enter the river Jahde; from the time the ship sailed from Philadelphia, and at the time of the capture, it was his fixed intention to proceed to Heligoland, and if he then learnt that the blockade of the Weser was raised, to proceed to Bremen, but otherwise to the river Jahde; before commencing the voyage in question he had made many inquiries, respecting the navigation of the North Sea, of various masters of American ships then in Philadelphia, and who had been accustomed to sail to Bremen, Hamburg, and the neighboring ports, who invariably told him, as he verily believes the fact to be, that it was necessary for ships, whether bound to the Weser, the Elbe, or the Eyder, or to any other intermediate port, to make Heligoland, and there to procure a pilot; and that he should not have attempted to have approached the mouth of the Weser without taking a pilot from Heligoland; as he understood and believed, if any American ship should attempt to enter without such pilot, and be lost, the insurance would be void, inasmuch as such navigation was considered as pilot's water. This affidavit appeared to account for the conduct and intentions of the parties interested in so satisfactory a manner, that the judge decreed the ship and cargo should be restored. From the documents, therefore, already successfully submitted by the respondents in this cause in the court below, it is contended that the legality of the voyage in which this vessel was engaged is satisfactorily proved, the appeal altogether groundless and * vexatious, and that the [* 167] sentence of the court below should therefore be affirmed with costs.

Dallas and Jenner, for the captor. It will be material to examine in what particular respects this case and that of *The Little William* agree, and in what they are dissimilar. They are both vessels sail-

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ing from America to Europe, about the same time, and under well grounded apprehensions of finding certain ports, to which they generally directed their course of trade, in a state of blockade, and, finally, were detained by virtue of one and the same order of council, which, in fact, distinctly proclaimed the Elbe, the Weser, and the Ems all in strict blockade. So far the cases are alike. The distinctions between them, in other respects, are essential. In favor of the present claim it is argued, that the contingent destination is disclosed in the ship's papers and letters on board, whereas in the case cited the private letters on board differed from the ship's papers, as to the asserted contingency, and induced suspicion that she intended to violate the blockade. In this instance, it is presumed the present case has a fairer claim to candor, and is less equivocal. It must, however, be apparent the case of The Little William has a feature of integrity which the present does not possess. In the instructions given to the master, the place and the persons of whom the inquiry respecting the existence of the blockade was to be made, were expressly pointed out. Here the contingency alone is disclosed, and every thing else indefinite, no doubt for the purpose of covering the fraud, should the vessel be detected entering the very mouth of the blockaded port. No direction is given to inquire of any particular vessels navigating those seas. The advantage to be derived [* 168] from leaving things in this * state of uncertainty was obvious ; and it is therefore only just to suspect that this advantage was in contemplation of those who so studiously avoid mentioning that which would necessarily be the first question proposed by the master, after a contingent destination had been agreed upon. Upon this point of law issue appears now to be joined, and there can be little hesitation in coming to this decision, that it is not competent to a vessel to sail from an American port to Europe on a contingent destination, with a previous knowledge of a blockade *de facto*, without disclosing in express terms where it is intended inquiry shall be made to ascertain the fact. As it must be made in the course of the voyage, the intended mode of ascertaining this material circumstance should be a prominent feature in a letter of instructions. The rule of law is positive, that it must not be made at the mouth of such port. By your lordships' decision in The Little William, it seems it is not necessary it should be made during the prosecution of her voyage up the Channel in a British port, although it would appear at least a convenient rule that it should be so. From this general rule, and the principle established by the judgment in that case, it becomes more necessary to require that the plan shall be distinctly pointed out by the instructions, in order to provide against

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any possible fraud and artifice. The facts of the case, also, are such as must tend to heighten the suspicion of intended fraud. In the preparatory examination, the master only states that he was steering for Bremen, to which the ship's course was at all times directed. No mention is made that he was steering for Heligoland ; of his actual intention to call there we can know nothing, except by inferring that the same course served for both. This amounts, at most, to a bare possibility that his evidence of such intention [*169] may be correct. In the attestation of the master, (which, it is observable, was not introduced as evidence until November, three months after the capture and two after the first hearing of the cause,) he deposes that he had made inquiries of some American masters of vessels, if it were not generally the custom for vessels bound to those rivers to call at Heligoland for a pilot. The necessity of calling there does not appear at all impressed upon his mind ; it is rather to be inferred he considered it optional. The affidavit admits that it was probable the port of Bremen, or even the Jahde, might continue in a state of blockade, and that the parties had the most complete and satisfactory intelligence, previous to the voyage, of the rigor of this blockade, is proved from one of the letters found on board, in which an American merchant deeply regrets that The Atlantic, a vessel bound from Philadelphia to the Weser, or, if blockaded, to Venet, on the Jahde, had been warned off the Weser, and, perhaps, had not been permitted, as the writer conjectures, even to attempt entering the Jahde ; in consequence of which the master had actually sailed for England, from whence he had written for fresh instructions to his owners in Philadelphia. The knowledge of these facts should have bound the parties to have directed inquiry to be made at once in some British port, or at least to determine precisely the place at which it should be made. Admitting, therefore, all that has been established by former decisions, as to the legality of contingent voyages, still the present must be held an exception to cases in general. In The Little William, the owner appears to have been aware of what should be done, and complied with that which is required by law, but was not sufficiently accurate in point of phrase ; he was, therefore, *considered entitled to the benefit of farther proof. Here, although the owner must be considered equally aware of his duty, he neglects it altogether ; evidently because it would not favor any scheme of change of intention, after warning or information received. Upon the decision of this court in this cause a most serious and important consideration depends ; namely, whether hereafter, vessels sailing under similar contingent destinations shall be permitted, long subsequent to the examinations

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in preparatory, to introduce affidavits disclosing those material circumstances on which it is presumed the original legality of the voyage may be proved. It may lead to a rule that, instead of determining on the legality of a voyage in the usual way, from the ship's papers and the examinations in preparatory, the owner need not make in any of them a distinct and determinate avowal of his actual intentions, but may reserve to a subsequent period the most material points for explanation, and proceed by the summary mode of an affidavit. This must be productive of the most material inconvenience, since that which has hitherto constituted the ground of determination and adjudication in a court of prize need not be disclosed on the face of the ship's papers in the first instance, but a justification of the intentions of the party may be produced at a subsequent period, when most convenient, perhaps, to the persons upon whom just suspicion of intentional fraud attaches.

JUDGMENT.

SIR W. GRANT. If the place at which the inquiry was directed to be made were inserted in the explanation offered, it appears to the court no material advantage would be derived from that [* 171] circumstance. * Neither would its insertion in a letter of instructions be of any great importance. All vessels, it should seem, do call at Heligoland for the purposes stated, where ample information may always be had on the subject. The appeal, therefore, appears to us so groundless that we shall refuse it, with costs.

DIE JUNGFER CHARLOTTA, Otma, master.

December 7, 1809.

Continuous voyage.¹ Part of cargo, consisting of salt laden in France, sold to a Portuguese merchant at Oporto, but not landed, so as to break the continuity of the voyage, condemned as a shipment within the restrictions of order in council, 7th January, 1807. This order held to extend to the property of a vessel engaged in such a trade and lending herself to the exigencies of the enemy. Vessel condemned as lawful prize. Residue of cargo laden at Oporto, Portuguese property, restored.

A PAPENBURGH vessel, laden with salt, sailing from the island of

¹ [For cases respecting continuity of voyages, see The Maria, 5 C. Rob. 365.]

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St. Martins for a port in the Baltic, was compelled by stress of weather to proceed to Oporto ; here the cargo was disposed of to a Portuguese merchant, the vessel repaired, with part of the proceeds, a quantity of cork laden in addition to the salt already on board for the account of the same merchant, and under charter-party she sailed from thence to Middleburgh, in Holland. In the High Court of Admiralty the judge decreed the cork and master's adventure to be restored, condemned the salt, and restored the ship without freight upon payment of the captor's expenses. From which both parties appealed.

Burnaby and Stephen, for the captor. Condemnation of part of the cargo of this vessel ensued in the court below in conformity with an order of council issued the 7th of January, 1807, prohibiting trade by neutrals between the ports of France or her allies. The voyage commenced at the French island of St. Martins, on the 12th of May, in the same year. The original cargo, consisting of salt, was laden there, and *the vessel proceeded as for a port in the [*172] Baltic, intending, as the master states, to call at Elsineur to ascertain what port he might safely enter. The progress of this vessel, if such it can be called, is singular. From the time she leaves St. Martins, steering her course as it might be naturally supposed for the northward, she is found for several days, as appears by her log and preparatory examinations, nearly in the same degree of latitude ; the first latitude mentioned being 46 degrees, the next 45, the two last 44 and 43 ; thus with an intention to proceed she is stated to have made a retrograde motion for ten days ; and this, it is pretended, is to be attributed solely to the excessive violence of the wind from the northward during the month of May, a circumstance which must tend not a little to affect the whole tenor of evidence given by persons on board the ship. Finding there was no possibility of making head, and that the ship began to be disabled, the master resolved, he says, to make for some free port ; namely, Oporto ; but wherefore Oporto ? He had passed along the Spanish coast, and Corunna or other Spanish ports were equally free ports for this vessel coming out of France to enter. Oporto was the place destined by the master to carry on a scheme of fraud which has been fortunately detected, though not adequately punished. Here he finds every thing suited to his purpose ; although he says he was distressed for money to repair the vessel, no advantage is taken of him, he gets a purchaser at 30*l.* per cent. profit for the salt, an article which is a drug at Oporto, and which is admitted to have been very much damaged by the sea. Singularly fortunate circumstances for him, when it is considered he

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was driven to sell because no credit could be obtained by [*173] him but on bottomry * bond at 40 per cent. Of the price of his cargo of salt he only obtained 137 milreas in specie, the rest by a draft on Amsterdam; yet his account of disbursements, whilst at Oporto, amounts to 230 milreas; hence it must be evident he had funds there or else he never could have met these demands. This affords a very strong presumption of falsehood in his testimony and of fraud in his intentions, in entering into this alleged agreement of sale and charter-party. The Portuguese merchant must be considered as his agent, and the vessel the instrument for carrying the scheme into execution. Neither, therefore, can be entitled to credit, and the whole property is deservedly liable to confiscation.

On the principle of law with respect to the necessity of an actual sale and landing, at some intermediate port, of cargoes coming from one interdicted port to another, so as to break the continuity of the voyage, it is observable that this vessel has not even attempted to comply with this regulation. The cargo, as coming from and going towards an enemy's port, was subject to condemnation. The entry into Oporto does not alter the nature of the property; it cannot be called an importation: no conversion takes place; the cargo is not even landed, but continues on board the same ship. In the various cases, similarly circumstanced, which have been brought into Courts of Admiralty, the claimants have in general proved the landing in the neutral port as essential to their case. The present does not even exhibit this inconclusive proof that the goods were in fact imported. Nothing can be argued either from intention, for the vessel enters the port merely through stress of weather; her destination was decided

upon, and no circumstances had then arisen to shake this [*174] resolution of the master. * Here, therefore, a vessel setting

sail with the produce of France from a French port affects to be or actually is driven to take shelter in Portugal. While in harbor an agreement is entered into by her master to take her cargo, with an addition for the account of a Portuguese merchant to a port of the enemy. The justification set up is, a sale has taken place, by which the property is neutralized: Upon the authority of several cases decided in this court and that below, no such sale can be admitted by itself to change the property and produce the same effect as an actual importation. Such was the principle laid down in the *Mercury*, *Roberts*,¹ and *The William, Trefry*,² when a review was taken of all the cases in point. In the case of *The Thomyris*,

¹ Lords, January, 1802.

² Lords, March 11, 1806. See 5 Rob. 385.

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Russel,¹ lately decided in the court below, a cargo of barilla, brought from Alicante, in Spain, by an American vessel, was transshipped by means of lighters to The Thomyris, then in the harbor of Lisbon, for the purpose of being carried on to Cherbourg, in France ; it was held that an ostensible sale and importation of this property merely into the neutral harbor, without a landing, did not constitute a legal importation, or break the continuity of the voyage. Had this been an innocent vessel taking, at Oporto, this cargo on board *de novo*, for Middleburg, without any knowledge of its previous importation there, from an interdicted port, perhaps, had there even been no sale or conversion of the property, the ignorance of the fact and innocence of intention might serve to exempt the vessel from a sentence of condemnation which must be pronounced upon the cargo as property appearing not to have been fairly changed by sale, nor actually intended for importation. Here both ship and salt are liable to confiscation, since the master is not only apprised of the criminal intention of the merchant, but is the person who [*175] brings in the cargo from the enemy's port, and which, without ever landing, he attempts to transport to another port of the enemy, in direct violation of the order of 7th January, 1807, and notwithstanding the indorsement made on his papers by his Majesty's sloop Hazard, enjoining him not to trade between ports of the enemy.

Dallas and *Arnold*, for the claimant. In arguing this case the questions of law and of fact should be treated of separately. In the court below the only point considered with respect to part of the cargo was the nature of the voyage, which the learned judge determined was continuous. None of the suspicious circumstances now alluded to with respect to the sale and expenditures were then introduced into the case. To argue the point of law raised this must be considered a *bonâ fide* sale, and her entrance into Oporto occasioned through distress. No prize court has adopted the principle that a *bonâ fide* sale does not operate to a conversion of a cargo without a landing ; the cases cited will not make out any such principle. The continuity of this voyage is effectually broken by the change of property effected by the sale, as well as by the agreement to commence another voyage *de novo* for account of a different shipper. The vessel is, therefore, not within the meaning of the order of council, since she cannot be either in the voyage to Oporto or from thence to Middleburg considered trading between ports in the possession of

¹ Edwards' Admiralty Reports, page 17.

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the enemy. In the case of *The William*, *Trefry*,¹ and the various other cases of continuous voyage enumerated in that judgment, the attention of the court was particularly drawn to the proof of actual importation by the duties paid in the intermediate port. It is there [* 176]* admitted, that "the truth may not always be discernible, but when it is discovered it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination." The court proceeded, therefore, to examine narrowly whether the landing and duties were colorable, and merely had recourse to for the purpose of deceiving a prize court in case of capture. But these are all cases proceeding on the ground of fraud, when the owners have voluntarily caused the vessel to enter certain ports convenient for their purpose, and in which they themselves generally resided. The present claimant appears under no such imputation. The vessel enters much damaged, through compulsion; the sale originates in distress; all appears fair. The counsel in the argument for the captors have said, that admitting the sale had been fair, yet as there had been no landing, condemnation must ensue. To raise the question of law, therefore, all supposition of fraud must be excluded. When a real sale, then, has taken place to a *bond fide* purchaser, it is not necessary to land a cargo so disposed of, to complete the conversion of the property, no more than it would be necessary for a merchant purchasing a cargo at a sale to import it into the place where he may reside in order to establish his property therein. In the case of *The Ebenezer*,² condemned on the principle of continuous voyage, the continuity of the voyage was proved to have been contemplated by the owner, and false papers were detected on board, describing the cargo to have been taken on board at Embden, when it appeared by other evidence it had been brought thither from Bordeaux, and after remaining only three days at Embden, was forwarded for Antwerp with a new clearance. [* 177] Here it was * held that fraud should operate to defeat the fraudulent. The sentence proceeded upon the intention of fraud manifested, not upon the circumstance of the vessel's not having unloaded her cargo at Embden; for in a note to that case is mentioned another, *The Schoone Sophie*, laden with colonial produce and bound for Antwerp, but having lain five weeks in the port of Embden, without being unladen, was directed to be restored without requiring further proof, although it was argued there were probable

¹ Lords, March 11, 1806. Admiralty Rep. vol. v. 385.

² Robinson's Rep. vol. vi. 250.

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grounds to suspect the cargo had been imported originally from a French West India island. This decision disproves the principle contended for on the part of the captors, and tends to support the doctrine that a good sale alters the nature of a voyage so circumstanced, and renders it no longer liable to be considered continuous.

Much has been said on the suspicious nature of the circumstances attending this voyage. Where are they to be found? Can any reasonable doubt be entertained that this vessel was compelled to make for Oporto. Log, sailors, and master agree as to the unfavorable state of the weather; with such a wind there was no Spanish port which he could make with safety. When in harbor, the vessel having received considerable damage, was it possible to proceed to sea again without repairs? The cargo is sold to procure funds. The master prefers taking his vessel out laden rather than in ballast, and enters into a fresh agreement to sail to a permitted port. On his examination here he does not deny he brought the salt into Oporto; the bills received in part payment for his cargo are found on board at the time of capture. Can a property thus fairly transferred to a neutral be supposed a proper subject for condemnation?

*An objection has been made to the decree of the court [*178] below, restoring the vessel and the cork. She appears to have been employed in carrying on a legal trade from Oporto to Middleburg, without disguise or deceit. No objection can be sustained on any established principle to such a trade carried on by a neutral. If no conversion of the property of the salt had taken place, still the cork was protected by being the growth and property of a neutral country. Admitting there was fraud in this transaction originally as to part of the cargo, it would not necessarily affect any other real neutral property on board. In all colonial cases this is admitted, although the fraudulent neutral loses whatever benefit he might derive from the property attempted to be covered. The order of council which was issued previous to the sailing of this vessel was merely intended to apply to a trade actually carried on, and originally intended to be carried on, between ports in the possession of the enemy or her allies. The vessel is by justifiable necessity compelled to take shelter in Oporto, and here she commences, after some time, a new trade, in which she must be considered fairly engaged *quoad* the intention of the order itself.

SENTENCE. December 15, 1809.

The COURT pronounced for the appeal of the captor as to the ship, reversed the sentence appealed from, and condemned her as lawful prize to the captor, and pronounced against the appeal as to the cork,

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affirmed the sentence of the court below in respect thereto, and assigned claimant to bring in the value of the ship.

Pronounced against claimant's appeal, affirmed the sentence appealed from, and remitted the cause.

[*179] * CAPTURE OF CHINSURAH. A GRIEVANCE.

(*From the High Court of Admiralty.*)

December 15, 1809.

Capture of a factory of the Dutch East India Company by the joint forces of the British East India Company and his Majesty's navy. Sums advanced upon contracts for supplying the factory with manufactures by the Dutch governor on behalf of the Dutch company, proper subjects of condemnation as prize to his Majesty. British company bound to account with the crown for sums recovered on a contract with interest thereon, of which it had possessed itself under an assignment to its agent, executed by the governor of the Dutch factory, having first failed in an action to recover the same in their right as captors. The company assuming voluntarily and without any particular appointment the character and benefit of agent for the crown, assumes likewise all the responsibility and liabilities of an agent. The pending of a suit in chancery here between these two companies respecting this property, which suit had been interrupted by war, objected as a bar to adjudication. Objection overruled. Costs. Expenses. Commission.

THE Dutch town and fort of Chinsurah, in the East Indies, were, on 3d July, 1781, taken possession of by The Nymph, one of a squadron under the command of Vice-Admiral Sir Edward Hughes, and a detachment of the East India Company's troops commanded by Captain Chatfield, and condemned generally as prize to his Majesty, to be distributed at his discretion. From this decree of the High Court of Admiralty two appeals were prosecuted, one on the part of the East India Company, praying the capture might be pronounced a land capture by the forces of the company, and as such not within the jurisdiction of the High Court of Admiralty. Another, on behalf of the admiral, the offices and crew of the said sloop, praying the capture might be pronounced to have been effected by the officers and crew of The Nymph only. Their lordships pronounced against both appeals, confirmed the sentence appealed from, and remitted the cause. In the High Court of Admiralty, after various proceedings, an account of the proceeds was brought in by the company's syndic on oath, which was referred to the registrar and merchants named by the court; who amongst other items reported, that a sum

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of 23,200*l.* had not been added to the account, as it appeared from information given by the East India Company, that the contractor from whom it was due had refused to pay the same to the East India Company, and that a suit had been depending thereon for some time in the East Indies. After several orders and decrees of the learned *judge, and different appeals on the part of the [*180] company, the judge, on the 19th May, 1809, pronounced the said sum then in the registry to be part of the proceeds arising from the said capture, and reserved the consideration of deductions therefrom, and of interest and costs. From this sentence the company now appealed.

His Majesty's Advocate and the *Attorney-General*, for the crown. The proceeds of this capture have been the subject of litigation at various periods since the year 1781. First with respect to the parties entitled to share, and subsequently as to the different species of property whether prize or not. Previous to the capture of Chinsurah the agents of the Dutch East India Company had entered into many contracts with neighboring merchants or contractors for supplies of the necessary articles for the trade of the company in that country; Johannes Mathias Ross, the Dutch governor of Chinsurah, entered into a contract with Henry Halsey, amongst others, for supplying the Dutch factory there with coarse cloths, and advanced to him for that purpose the sum of 23,200*l.* on account. At the time of the surrender of Chinsurah this contract remained unperformed. The other contractors accounted with the English East India Company, and made good their respective contracts. A suit was instituted against Halsey in the Mayor's Court of Calcutta, in Bengal, by the East India Company, in their right as captors of Chinsurah, for the amount of such advances made by Governor Ross, which suit was dismissed with costs in 1783. The company having failed in this action founded on their right as captors, had recourse to another expedient, and procured, through the medium *of [*181] a Mr. Purling, an assignment, executed by Ross, for a trifling consideration, of the amount of the contract, and commenced a suit in equity for its recovery from Halsey, who by a decree of the Supreme Court of Judicature of Fort William, in Bengal, in 1784, was condemned in the said sum and costs. By this decree the company became entitled to receive the amount, and payment was immediately enforced of the greater part by the sheriff's levy on Halsey's property at Calcutta. The first question now for your lordships decision is, shall the amount of this contract be appropriated to the same purposes and distributed in the same proportions as the former

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sums of money, part proceeds of this capture. The judge of the High Court of Admiralty has decided in the affirmative, and pronounced the sum of 23,200*l.* now remaining in the registry pursuant to his order, to be part of the proceeds arising from the capture, and directed it to be invested in navy five per cents. until the decision of this court shall be known, without prejudice to the present appeal. In the various arrangements subsequent to the capture of Chinsurah, the East Indian Company have considered themselves authorized by the letters patent granted to the company in 1782, to stand in the place of the British government. The contractors in general acquiesced in this determination of the company, and paid the sums due voluntarily. Mr. Halsey alone contests their right. The company, conceiving it theirs as a droit of war, institute a suit and set forth their claim. How was this claim dealt with? The court were then of opinion that the company had claimed that which did not belong to them by their original charter, nor could not strictly be considered

theirs in pursuance of the letters patent of the 19th September [* 182] 1782, which gave them only a right to booty and plunder generally. These letters were, it was observed, issued subsequent to the capture. In the report made by their attorney to the company upon the issue of this suit, he observes: the objection to the company's claim, which occasioned judgment to be given against them, was made by the chief justice, and acceded to by Mr. Justice Hyde, (not taken on the part of Mr. Halsey,) and was, "That it was not intended by the letters patent granted to the company to convey debts due from enemies, though the parties might have happened to be made prisoners by their forces; consequently the sum claimed, being a debt in their judgment, did not come within the meaning of the letters patent, which only grants to the honorable company all such booty or plunder, ships, vessels, goods, and merchandises, and other things whatsoever, which since the letters patent of the 19th day of September last, have been or shall be taken or seized from any of the enemies of the company," &c. In either case, therefore, the court were of opinion the company had no right vested in them for the recovery of this property. They, however, do not lose sight of the means for possessing themselves of this as well as other droits of the crown, and appropriating them exclusively to their own advantage, and, therefore, since an application founded upon a right supposed to be derived from his Majesty had failed, they proceed to lay the foundation of a ground of proceeding in a civil way, and obtain through the medium of their agent, Mr. C. Purling, a new title; Purling procuring from Governor Ross an assignment of his claim on Halsey, in consequence of the non-performance of the contract, and

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*making himself a fresh assignment of this claim, so derived, [* 183] to the East India Company. The assignment is made by Ross to Purling for the paltry sum of five rupees, and by this artifice the company derives a right to the immense sum of 232,000 rupees. They now stand in the place of Ross, and whatever right he had, appeared to be vested in them. Whatever might hereafter be the opinion entertained of the validity of this assignment, or the right of property at that time vested in Halsey, they considered perfectly immaterial; trusting that should they once become possessed of the property, there would be but little chance of an inquiry being instituted into the means resorted to in obtaining it. The suit was brought in the name of Ross, and judgment given against Halsey, upon which the company proceeded to levy the amount. In the year 1796, the then Procurator-General prayed the judge of the High Court of Admiralty to assign the East India Company to bring into the registry the sum of 23,200*l.*, which, by the report of the registrar, to whom the accounts had been referred, still appeared to be due as part proceeds of the capture. On the part of the company it was then objected, that the sum in question was now the subject of a suit in the High Court of Chancery of Great Britain at the instance of the Dutch East India Company, who disputed the validity of the assignment made by Ross to Purling. The judge directed the question to stand over until the determination of the said suit. In 1808, a similar application was made on the part of his Majesty, by the king's proctor, denying that any suit was then depending between the two East India companies relative to this property, and that even if it were, still the money ought to be paid into the registry with interest from the time it was received *by the company. [* 184] On the part of the company it was alleged, that the suit instituted in his Majesty's High Court of Chancery, on behalf of the Dutch company against the English company, for the recovery of the said sum, was still depending undetermined in that court; that the bill was filed during a time of peace between this country and the States of Holland, and hostilities having shortly afterwards commenced between the said countries, the proceedings in the suit became suspended; during the short interval of peace which followed, and previous to the recommencement of hostilities, by which the Dutch company became again incapable of enforcing any further proceedings, no answer had been obtained; and the English company having been advised by their counsel not to put in an answer to the said bill until compelled thereto, (as also that it would be extremely difficult to set up any legal defence to the claim of the Dutch East India Company,) had not taken any steps to obtain a decree for the

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said bill to be dismissed : and further, that upon cessation of hostilities, the said Dutch East India Company, or their representatives, would be at liberty to pursue their judicial remedy for its recovery. Upon this representation of the parties, the judge decreed the monition to the company to bring the sum in litigation into the registry. This was immediately brought in, and an application made on the part of the company to the court, alleging they had incurred considerable costs in the suit against Halsey, and also in carrying the said decree into execution, amounting to 483*l.* 6*s.* 11*d.*, and had only received in consequence of this decree, part of the amount of the judgment, of which 4,968*l.* 19*s.* still remained unpaid, [*185] praying the said sums might be refunded from *that brought into the registry, particularly as the property had not been adjudged to belong to the crown, but had been recovered by them in the right of Ross, in a transaction of a private nature, and not as agent for the Dutch East India Company, as would appear from the correspondence of Ross and Halsey, annexed to the papers in the cause ; and lastly, submitting that the crown was therefore not entitled to any interest on the said sums during the time it was in the hands of the company. This cause was finally heard in the High Court of Admiralty on the 19th May, 1809, when the judge pronounced the sum in the registry to be part of the proceeds of the said capture, and reserved the consideration of deductions therefrom, and of interest and costs : from which the company have thought proper now to appeal. The court has now to decide upon the question, Is the sum at present in the registry to be considered prize, and, as such, subject to be distributed at the pleasure of his Majesty ? The court below is also desirous to receive the benefit of your lordship's opinions on the reserved questions of deductions, interest, and costs.

The company have attempted to establish a distinction between the nature of this sum recovered and that recovered upon the other contracts ; the others were voluntarily paid in. No question was agitated as to the right of the company, or it would have probably been discovered that the company had no stronger claim to one than the other. Halsey appears to have been aware of the weakness of their case, and the court decides that the company's claim is invalid, and states the reason of its decision ; the right of possession must therefore rest with his Majesty. Because they have failed in recovering in their right as captors, it is not to be inferred the claim [*186] * of the crown is thereby affected or weakened. This court has already decided that the former sums obtained on the other contracts are prize. No distinction has been or can be made by the company between this and others ; there cannot remain a

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doubt that this sum must also be considered part of the proceeds of the capture, and subject to the regulations respecting prize.

It has been suggested by the company, there is a possibility that as a suit has been commenced in the chancery here, between them and the Dutch company, which still continues undetermined, they may yet be compelled to pay this sum into the Dutch company; that is, in other words, as this right between these two companies may by possibility never be decided in the Court of Chancery, the suit between the crown and the English company should never be decided here; although the issue of the former must ultimately depend upon the latter, if such a suit actually depends. But what ground can a Dutch East India company have under the circumstances of this case to support such a right? This alleged suit was commenced in the peace which followed the capture. A new war broke out, to which succeeded the short peace, during which nothing had been done for prosecuting their claim; and the present war commenced. Is it to be supposed that the Dutch company would have abstained from further proceedings, unless they were perfectly aware their case was hopeless? and are the just claims of his Majesty to be set aside *ad infinitum*, under the pretence that a suit is yet pending by which the English company may hereafter be compelled to pay this very sum, when that suit has lain dormant for two intervals of peace, distant from each other several *years. [*187] The East India Company have, no doubt, fed this cause, and that from a conviction of the benefit they so long have been deriving from it. It has been suggested by a very high authority at the chancery bar, that the Dutch East India Company could not stand in a court of equity. In a court of law we cannot recognize them. To sustain an action there, they must bring it in the names of the individuals composing the company; and supposing that they had even done all that was requisite to bring themselves within the protection of a British court of jurisdiction, the suit might nevertheless have been moved to be dismissed after three terms had elapsed without prosecution. What then can be urged in favor of such parties as these, who have continued to uphold their suit for fifteen years to their own advantage? Supposing that recourse has been had to no artifice to keep it alive, the utmost that can be alleged is, the claim of the Dutch company, such as it is, merely remains. There appears something, however, very doubtful and suspicious in the nature of these dilatory pleas, which have from time to time been set up; and hence the court will be the more disposed to decide in favor of a claim urged with all possible candor and fairness, and which has been already too long defeated by the perversion of legal proceedings,

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since the English company have all along been permitted to derive advantage from their own wrong.

The question, however, now before the court is, that in which no court of equity can possibly interfere. It may be imagined a bill of interpleader might be instituted in chancery, whereby the two companies might be permitted to plead the right of property, if that property still continued at the disposal of that court. But it is [*188] *not so; this is a strict question of prize. In the judgments given on the former appeals, your lordships decided, that sums of money produced in a similar way, by calling contractors to account for money received on account of the Dutch East India Company, were droits of war, and subject to the usual mode of distribution in cases of prize. Whatever litigation might exist with respect to that property, or whatever might be the decision of the Court of Chancery upon such, you would not respect it, as the court was not one of competent jurisdiction to try the real question at issue. In the same manner the property in this case being of a precisely similar nature, your decision should turn merely upon the facts of the capture, the nature of the property, and of the contract between the parties, without any reference to such a suit, if actually in existence, which, if it does exist, is altogether to be imputed to their own negligence in not moving for its dismissal. Nor will this court be disposed to sanction the idea, that a suit in chancery rendered perpetual by the negligence or by the interested views of a party, shall be also a perpetual bar to the just claims of the crown.

On the subject of interest accruing on this sum since the company became the legal possessors of it in right of the judgment against Halsey, it is worthy of observation, in that instance they demanded and recovered the interest arising thereon from Halsey. They obtained it, it is true, by indirect means, but retained it subject to the claim of the crown, and, as they well knew, merely held for the crown *pro tempore*. No grant by charter or patent having ever been made of such property; this money, so due by Halsey, they recovered with interest. With what show of justice, then, *can they, receiving it with interest and applying it ever since to their own advantage, call upon the court to refuse the application made on the part of the crown? It would be, in effect, holding out a premium for injustice to those who hereafter might have equally cogent motives to hold over property, of which they had illegally obtained possession. If the company be not compelled to account for interest, it may prove a strong inducement, in future, to devise means for obtaining possession of money due to the crown as soon, and procrastinate the payment as late as possible; the interest

[*189] vered with interest. With what show of justice, then, *can

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accruing in the interval being so much clearly gained. So great has been the anxiety of the company to keep possession of this money by any means, that, when the registrar drew up his report in 1793, they sheltered themselves by asserting that there was then a suit pending respecting it in the East Indies, whereas that suit had been determined, the money recovered, and, for the greater part, levied, in the year 1784. When parties are detected in such artifices as these, to elude the demands of a just claimant, and keep possession of a property to which they are not entitled, they cannot be too strictly dealt with; and as the company is always able to make, at least, the usual interest on money in their possession, they are left without a shadow of excuse for resisting the payment of that interest to the crown.

With equal show of justice they enumerate various sums of money, to which they contend they are entitled, as deductions and allowances from this property. Leaving to the discretion of the court the question whether they are entitled to costs, in an action to which they presumptuously and without right made themselves parties, we must be entitled to the remainder ^{*} of the [* 190] sum recovered under the judgment, but which Halsey has not since paid. The company have taken upon themselves to act as agents for the crown, without any authority whatever; they are, of course, subjected to all the responsibility which attaches to the situation. For the money they have received they are responsible, as other agents usually are; for that which they have not received they are equally responsible, inasmuch as they might have received it. From 1784, when judgment was obtained, to the time of his death, they might have had execution or process against his goods or person, and it is not disputed that he was perfectly competent at all times to discharge the whole. Nay it even appears, by the memorial of Halsey himself to the governor general, the company were actually in treaty for its payment, and he then offered to pay the whole in bonds of the company long since due, for money advanced by him thereon to the company, only requiring that he might be indemnified from all future claims on this head by any other party. He disclaimed any wish whatever to enter into a dispute or litigation with the company, as it was immaterial to whom he should pay the money, provided he was secured against future demands. This was rejected, and the company preferred a suit at law, when they might have attained their object without it. Shall the crown suffer for their obstinacy in this instance, or for their remissness in not compelling the payment? There must be something mysterious in the conduct they have pursued. If they, acting as agents, have shown

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such anxiety to obtain the possession of this property, yet such reluctance to part with it to those for whom and in whose right they received it, there is much reason to suspect they have their private reasons for not enforcing the payment of the residue due [*191] on the judgment nearly twenty-six * years ; and as they have acted the part of unfaithful agents, there can be no ground for the allowances claimed, or for the indulgence sought from the court, except, perhaps, that which has already been granted them in the court below, in lieu of all other charges and costs ; namely, an adequate commission per cent. for management upon the whole sum received as proceeds of this capture.

Adam and Swabey, for the appellant. The extraordinary delay which has attended the proceedings of the company in recovering this money, has been occasioned by the necessity of examining witnesses at considerable distances from the seat of justice. The company have endeavored to give every facility to the prosecution of this cause, and the courts have uniformly desired the suit to be staid until the *lis pendens* should be concluded. Hostilities between Great Britain and Holland still continue. The natural consequence is, the Dutch Company's claim, of course, is dormant, not extinct. If the High Court of Admiralty can now cut the difficult knot, it may be fairly asked, why was it not long since effected ? The objection which formerly had such weight with the court continued, and still continues in full force. So cautious was the court of proceeding in this cause, that, for a considerable time, no other order was issued than that for bringing the property into the registry, and finally for its investment in the funds. The parties have no right to accuse each other of laches. If it was the duty of the company to bring all the contractors to account, it was equally the duty of the crown to exhibit its claim and enforce payment from the company.

Equal culpability attaches to both parties. Doubts are [*192] said to be entertained whether the Dutch * Company can avail itself in this country of any right or claim it may have on this property in its corporate capacity. If it were so, the company would be peculiarly unfortunate to be excluded from redress by a defect in the letter of the law, when the spirit and general tenor of British jurisprudence has been so long extolled, even by foreigners, for its liberality with regard to the property and rights of foreign merchants. But they are not precluded by the letter of the law from enforcing their claims ; and, in support of this assertion, the case of The Osterrever is particularly applicable. This was a proceeding held in the Court of Exchequer, where the Dutch

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East India Company was publicly recognized, the case decided, and no objection made to that company of merchants appearing in their corporate capacity. This authority is decisive, as to the possibility of their setting up a claim to this property and recovering at a future period of peace. If a proceeding could with propriety be instituted, under such circumstances, in a court of equity, the answer would be, — The Dutch Company are now, it is true, by war precluded, but they may yet appear in peace. This might, therefore, have to be paid over by the same parties. It is attempted to show that, as the court below has decided this property to be prize, and this court has determined the same with respect to sums arising from similar contracts, a court of equity could not be admitted to dispose of this as it might were it only private property. No such consequence can be fairly drawn. We cannot recollect any principle which would prevent the English Company being desired, by a decree of a court of equity, to pay this money, if an interval of peace should arrive. Hence the *lis pendens* has equal weight at present as when first pleaded in bar to this demand.

* As to the nature of the property, it is quite obvious this [*193] cannot be prize. The law of prize operates only on the bulk of property, not upon *choses in action* and mere rights yet to be ascertained. If it embrace those due to the Dutch Company, in their deputed capacity as governors of an enemy's colony, it certainly does not extend to debts due to a private person, though an enemy. If the former sums due on contracts were decided in this court to be prize, it must have been from a conviction that they were debts due to the Dutch state, or else no such judgments would have been made in the years 1793 and 1795. The judgments given here upon the appeals from those decrees, with respect to other sums claimed by the company in their right as captors, do not enforce the opinion which Wroughton says, in his letter to the company, prevailed in the mind of the court at Calcutta in the first action. That ground of litigation was not then advanced. The judgments only pronounced the court below was justified, first, in directing a more satisfactory account by the company; and, secondly, by determining certain sums were part proceeds of the capture, and, therefore, subject to be distributed as prize to the forces engaged. When, however, the judge below called for the assignment made by Ross to Purling, the original could not be found; and, to explain the transaction, various papers of correspondence were introduced, which altogether changed the nature of the case. In these letters Halsey writes to Ross to state explicitly in what capacity he considered the engagement had been entered into by him; whether as governor, and

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acting for the Dutch Company, or by him as a private individual.

The answers are as explicit as required :— “ I consider the [* 194] dealings between us as those between private * merchants only, and no more.” Both, then, consider themselves as transacting business on their own account; and Halsey, in his memorial, anxiously requests the matter may be concluded, on his paying the money and receiving a release. The cause, however, comes on, and the property is decided on as private property merely, or rather a *chose in action* between private individuals, and therefore not subject to the law of prize.

If the company be now directed to pay the amount with interest, a future application to a court of equity will, perhaps, obtain a decree, whereby the company may be compellable to pay it and interest over again to the Dutch Company, or to Ross; for in one or other of these parties the right of property must lie. The judge below decided that no interest should be granted on those sums which have long since been decided to be lawful prize; and no appeal was ever made from that decision. Here a doubt has been entertained respecting the nature of the property, and the agent of the crown has for a long time apparently neglected to enforce its right; the court will therefore not be extremely anxious to give that party interest which has accrued in consequence of its own negligence. The sum yet due from Halsey should be at all events deducted; since there appears to have been no inattention on the part of the company in carrying the judgment into execution. In the memorial of Halsey, he alleges great difficulty arose in obtaining money in India, except through the instrumentality of the company. This may furnish a reason for the delay in the payment of the residue. In addition to this sum the court will, no doubt, add the ten per cent. for management upon the gross amount, which has been granted below in lieu of all other charges.

[* 195] **The King's Advocate*, in reply. The inconsistency of appealing to the forbearance of the court after near thirty years' illegal possession of the property is too obvious and glaring. If I understand the rule of an equity court aright, the bill which is to prove the great barrier to justice if unprosecuted for three terms might have been moved to be dismissed. Why have not these self-constituted agents of the crown, therefore, done their duty? Referring to general principles of the law of nations, there exists no bar to your concluding this property to be of the same nature as the former sums disposed of as prize. It has been said, prize consists of property in bulk. In the way in which this has been argued it

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is impossible to accede to it. Referring to the utmost rights of states to avail themselves of conquests made, our right is self-evident as conquerors; possession may be taken of every thing which is the property of the subjugated state, or might have been converted into property by it. If the victors obtain possession of a bond, what can prevent them from enforcing the payment of it from any individual? No distinction can be shown between the nature of this property and that already decided upon several years past. The judgment of both courts of prize appear sufficient to bear out this inference, that the company was accountable for those sums due on the other contracts as *choses in action*. A query has been suggested, whether a private *chose in action* would be in strictness prize. Reverting to first principles it would appear so. The relaxation of the rigid rules of conquest may probably constitute exceptions. But the proof that this property is of a private nature has altogether been deficient. Shall an *ex parte* correspondence, over which we can have no control, and a memorial of Halsey an interested person, neither of which were introduced until the year 1796, be [*196] permitted to change the case so materially, and shall it be now introduced for the purpose of proving that Halsey acceded to the payment upon condition, though it was his interest to have contested the assignment as altogether invalid? Duplicity and artifice pervades the whole transaction. Purling, the trustee, is also a public commissioner. Thus it is a payment privately for the commissioner's use publicly. Accounts, it appears, have been also kept by which it appears the company have paid off *choses in action* to neutrals, whilst they resist the just right of the crown.

Our claim to interest is disputed merely because it has not sooner been demanded. The crown has throughout the transaction been too indulgent. A demand is now made only for interest on part of the proceeds. If both parties are culpable for negligence, we should, on common principles of equity, be entitled to half the beneficial consequences; that is, half the interest. Our neglect has been favorable to them, but it arose from credulity, believing the company would take no unhandsome advantage of the indulgence afforded by the officers of the crown. It will, however, be a wholesome warning to us in future to look with jealousy upon their conduct where their duty and their interest may be placed in competition.

The court will no doubt see the injustice of demanding by a sweeping charge of ten per cent. for management. Let them specify distinctly the expenses to which in this particular instance they have been put by enforcing the crown's right; if they act as agents, as agents they should account. The agency is still imperfect, and they

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as agents should complete the recovery of the property taken into their charge before any claim can be admitted for deductions; [*197] and if the accounts be again referred to the registrar * we hope the company will be directed to account for the sum of 26,530*l.*, the amount recovered under the judgment, also specifically for all sums received and all charges and deductions demanded.

The Court took time to deliberate.

JUDGMENT.

February 1, 1810. SIR W. GRANT. The only doubt which arose in our minds with respect to the claims of these parties was, whether the 23,200*l.* the sum in the possession of the company previous to the breaking out of a fresh war, was subject to a similar order as had been already made with respect to the sums received upon the other contracts. Whether the Dutch East India Company can avail themselves of their claim in our courts here we are not called upon to determine. The suit it seems was not commenced by them until ten years after peace had been concluded. The recommencement of hostilities prevented its being prosecuted for a time. Peace is restored, yet no further proceedings are had by any party until the present war again obstructs the prosecution of such a suit. We are now decidedly of opinion there can be no question how the matter should be decided as between the crown and the English East India Company. No difference exists between the grounds of their claim to this and to the former sums. The papers exhibited in the court below in 1809 do not state that the company had derived a new title to this property, and that a new case had been made out from these papers. Their great object appears to have been, the deductions and allowances for specific sums out of the total. The assignment was only obtained in aid of their former title. Purling acts [*198] merely as their agent; the *consideration given, though denominated valuable, is obviously nominal and trifling in comparison of the sum to which the claim is thereby intended to be derived. The contracts are precisely of the same nature and for the same sort of consideration.

Throughout the whole transaction it is distinctly proved the company interpose themselves as trustees for the crown merely, and must be accountable in like manner for this as for other sums received. The sentence of the court below must, therefore, be affirmed.

This sentence contains a reference to a subject of interest and costs. We are now requested by the parties to give an opinion upon these respective claims. In 1796 an application was made for inte-

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rest upon the gross sum arising from the proceeds of this capture and the costs of the proceedings in that cause which was rejected. From that period we are of opinion the company should account for interest at the rate of 5*l.* per cent. upon this particular sum. There can be little doubt that if the facts disclosed in the paper submitted in this cause in 1809¹ to the court below had been known in 1796, an order would have been made for the company to deposit the sum in court. On the equitable principles, therefore, the crown is entitled to the interest accruing since that time. The question of deductions must be again referred to the registrar and merchants, and in deciding how far the company is *entitled, attention [*199] should be paid to the complaint made by the crown's advocate, that there has not been due diligence shown in the prosecution of its interests. No costs can be allowed, as this is at the suit of the crown.

SENTENCE.

The Court pronounced against the appeal, affirmed the sentence appealed from, and retained the principal cause, and directed the appellant to pay interest at five per cent. upon the sum remaining in the registry from the 8th of June, 1796, until the time of its being paid into the registry, and referred the deductions from the said sum claimed by the company to the registrar and merchants to report thereon.

February 24, 1810. The registrar reported that the amount of the demand of the company against the estate of Halsey, as appeared by referring to the decree of the Supreme Court, exceeded the sum brought into the registry, 5,236*l.*, from which sum, deducting law charges, additional costs of execution, and a commission to the company of 5 per cent. on the total amount to 1,905*l.*, a surplus of 3,331*l.* still remaining due from the estate of Halsey.

For the crown. It was argued that the crown was entitled to recover this surplus with interest thereon from 1796 in the same manner as upon that already brought into the registry.

¹ The assignment from Mr. Purling to the East India Company, by which the company became entitled to recover in right of the former assignment executed by Ross to Purling. Ross's original assignment was recited in that made to the company, but could not be produced. An affidavit was introduced to prove that neither the assignment nor any copy of it had been transmitted to the auditor's office at the India House.

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JUDGMENT.

SIR W. GRANT. The specific sum of 23,200*l.* was both in this and the court below the subject upon which a decision has been obtained, and we supposed it was assumed by both parties as the only sum upon which both as to principal and interest since 1796 any [* 200] * question arose. The report now presented differs however in point of form from the decree. When deductions were claimed by the company, we thought it not improper to order their accounts should be inspected. For although the sum brought into the registry was that alone which with interest had been claimed, as nothing was satisfactorily known of the account between the company and Halsey, it might hereafter prove that more was owing on this account to the company than had yet been acknowledged. It would then have been extremely unreasonable that they should be permitted to claim deductions on the smaller sum when probably an excess remained in their hands, or it was in their power to enforce its payment. The report as it stands is not strictly warranted by the decree; for it proceeds further and calculates interest and deductions as on the larger sum. The company, however, appears to be more than compensated by the excess of the sum which was recovered on the judgment, for the expense attending the agency for the crown. We, therefore, strike off the items of expenses and charges demanded, and consider the matter as nearly equitably adjusted between the parties; the company allowing on the one hand for some things they have not received, and on the other being permitted to remain in possession of an excess for which they have not been hitherto called regularly to account. And here we are of opinion the matter should rest.

FINAL SENTENCE.

Their lordships directed the registrar to amend his report accordingly, which was immediately done, and their lordships confirmed the same so amended, and pronounced that 14,886*l.* was due from the company as interest upon the sum in the registry, and assigned [* 201] * their syndic to bring it into the registry; and the same being brought, their lordships dismissed the company and their syndic from the cause, and from further observance of justice therein, and finally rejected the petition of his Majesty's proctor for a monition against the company to bring into the registry the sum of 3,331*l.* mentioned in the said report.

The Charlotte. 1 Acton.

THE CHARLOTTE, Stromsten, master.

January 25, 1810.

A Swedish ship, laden with tar, pitch, and deals, sailing under instructions to take British convoy for Lisbon, in case the master should not be able to obtain a purchaser at Copenhagen for the ship and cargo, but afterwards detected entering a Dutch port, liable to condemnation with her cargo, notwithstanding the protest of the master, alleging the impossibility of obtaining convoy, and that the deviation was occasioned by his apprehension of capture by French cruisers. All favorable construction with respect to the general trade of Sweden in these articles removed by suspicious circumstances in the case.

AN appeal from the sentence of the High Court of Admiralty, condemning this vessel with a cargo consisting of tar, pitch, and deals, the property of a Swedish subject, ostensibly bound for Lisbon, but captured in attempting to enter a port of Holland.

The *King's Advocate*, for the captor, stated, that upon the principle so decidedly adopted by the court below in the case of *The Franklin*,¹ from which sentence an appeal having been since prosecuted, the sentence had been affirmed, and the appellant condemned in the costs of the appeal, there could be no justifiable ground of appeal in the present case; he therefore hoped the court would punish the obstinacy of this appeal by the condemnation in costs.

Jenner and *Stephen*, for the claimant, distinguished this case from that of *The Franklin*, in which there was reasonable ground to suspect the master of an intentional fraud. Here no such intention could be imputed. The circumstances of this case were peculiarly favorable to the claim. This vessel proceeded upon her voyage subsequent to the permission granted by the king of Sweden, our ally, to his subjects to trade with the Dutch ports in innocent articles. In consequence of this permission an order of council issued "on the 31st July, 1807, whereby our cruising vessels were [* 202] enjoined "not to seize or detain the property of the subjects of our ally, the king of Sweden, (not being naval or military stores,) on account of so trading," and further directing the different judges of prize courts "forthwith to release property, not being naval and military stores, belonging to Swedish subjects, which has been, or

¹ Rob. Rep. vol. iii. p. 217.

The Charlotte. 1 Acton.

shall be, detained on account of being engaged in a trade with the Dutch ports." Admitting, therefore, that the original design of the voyage was for Holland, as the vessel sailed the 12th of August following, and could not, therefore, be in time apprised of the restrictive clause in this order, she was entitled to take the permission given by his Swedish Majesty in its liberal construction, and consider this cargo, which was entirely the produce of Sweden, to be altogether or for the most part included in the general terms "innocent articles." The original design of the voyage was from Wasa to Lisbon, but the master had instructions to dispose of this vessel or cargo if he could obtain a purchaser at Copenhagen, where he was to touch for the purpose of obtaining a British convoy for Lisbon; he had repeatedly sailed under similar protection to avoid capture, as he states, by French privateers. The protest of the master, which was corroborated by the evidence of two seamen on board, detailed the circumstances under which he was induced to make this deviation from his original intention. It stated, that on arriving in Copenhagen roads he found no convoy was then appointed, and, therefore, put into Landscrona for the safety of his ship. On the 10th of September The Falcon was appointed, and he went on board her to obtain instructions, which were refused, as his vessel was not then in the roads. On the 17th the convoy sailed. Contrary winds [* 203] * detained him in Landscrona until the 18th, when he set out in company with several British ships, carrying a heavy press of sail, to overtake the convoy. These vessels parting company, and the wind coming round to the west, he despaired of overtaking the convoy or fetching a British port, and being apprehensive of capture by French privateers, he determined to make the first port he could in Holland, which the owner had instructed him to do should he be unable to join convoy, lest he should be captured by the enemy. These circumstances were amply sufficient to justify his entering the Dutch port. Had the intention of the voyage been direct to Holland it would have been legalized by his sovereign's permission. Admitting what had hitherto been a matter of considerable doubt, that these articles, the native growth of the exporting country, were not innocent articles, nor intended to be included within that description, still they alone would be subject to condemnation. This would be the fair measure of justice. Such had been the practice of the court below in several cases. This was not a case of contraband, strictly speaking. In *The Neptunus*¹ the learned judge of the court

¹ Rob. Rep. vol. vi. 403.

The Charlotte. 1 Acton.

below after observing, that by the modern practice of warfare frequently cases of particular relaxations had occurred, adds, "that Swedish vessels were permitted to go into French ports with permitted goods, and this country had acquiesced in that indulgence." Thus it was not very singular the Swedish subject should be liable to error, when the practice differed so materially from received and long established principles. If the importation of these goods was not only illegal but known by the master to be so, then condemnation would undoubtedly be fair. And the learned judge proceeded to state, referring to the order of council alluded to, * "this class of cases [*204] is not to be decided, strictly, on the general principle of contraband. I shall not apply the principle of contraband to the ship." If the representation of the master and sailors by the protest were true, then both ship and cargo should be restored, as the only reason for which the vessel could be liable to seizure would be for the purpose of preëmption with respect to the exceptionable part of the cargo. Considering this as a voyage antecedent to notice, it would only be just that the court, acting in conformity to the less rigid spirit which appeared to predominate in the judgment alluded to, should in this particular case decree restoration of the ship and the value of the goods.

The *King's Advocate*, in reply, observed, that each case in which restoration had been made of the remaining parts of the cargo had been characterized by the utmost fairness. Where even innocent articles might appear to have been sent with a fraudulent design or suspicious conduct, it should tend to remove all favorable construction. Had the deviations of the master been the result of necessity? What proof existed of the master's intention to take convoy? It rested on mere assertion. No reliance could be had on such testimony. The voyage originated in intended fraud; for the party must be aware the Swedish treaties at the utmost only subjected their permissive trade to a very severe right of preëmption. The case was, strictly speaking, a case of contraband with false papers.

SENTENCE.

The court pronounced against the appeal, affirmed the sentence appealed from condemning the ship and cargo as lawful prize, and condemned the appellant in the costs of the appeal.

[*205]

*THE ORION, Petersen, master.

February 3, 1810.

Further proof inadmissible where a party representing a cargo as Danish to evade the belligerent right of an ally, has by such a representation subjected it to be condemned as a droit to the crown, more especially if such representation tends to defeat our own belligerent rights. No permission given to the party to disprove their former allegation as to property.¹

THIS was an application made to the court to reverse the sentence of condemnation pronounced by the judge of the High Court of Admiralty upon the cargo of this vessel, for the purpose of admitting further proof of the property.

King's Advocate and the *Attorney-General*, for the crown. This vessel, sailing under Danish colors, in the prosecution of a voyage from Archangel to Leghorn, was captured on the 10th October, 1807, by the privateer Young Phoenix; his Majesty's Procurator-General intervened for the interest of his Majesty, and the ship and cargo were condemned as the property of Danish subjects, taken prior to the declaration of hostilities, and a droit of war. The papers introduced in this cause are all admitted to be false. The most systematic perjury has been had recourse to for the purpose of concealing, as it is alleged, the real proprietors of the cargo, who are now attempted to be proved, not Danes, but merchants of Lubeck. That which prompted this false representation is stated to be an apprehension entertained on the part of these Lubeck merchants that affairs were rather in a critical situation between Sweden and the city of Lubeck in consequence of the recent occupation of that city by the French, and the seizure of all Swedish vessels in that port. They were, therefore, afraid lest the Swedish nation should be induced to retaliate upon their trade the injuries which the Swedish merchants had sustained in their harbor. If such were the nature of

[*206] *the fraud and the motives which produced it, certainly it might lose some of its culpability in our courts of prize, although it would not even here be proper to relax the old rule for constructing falsehood and perjury unfavorable to a claim in every stage. The account which has been given of the transaction by Mr. George Meyer, merchant of London, and claimant for the house of

¹[1 C. Rob. 322, The Welvaart.]

The Orion. 1 Acton.

Messrs. Croll & Son, of Lubeck, states, that he believes the cargo was, and is, really and *bona fide* the sole and exclusive property of Messrs. J. M. Croll & Son, of Lubeck, merchants, who formed the plan of the said voyage so long since as December, 1806, when they ordered part of the goods to be purchased by Messrs. Brust & Co., their agents at Archangel; they subsequently ordered the remainder, and in May, 1807, chartered the ship Orion, then lying at Hamburg, to proceed to Archangel, and there take on board the said cargo for their account, and in their name, and to proceed therewith to Leghorn; but the French having, upon their entrance into Lubeck, seized all the Swedish ships in that port, and apprehensions being entertained of further encroachments from the French, and that the Swedish government would retaliate upon the Lubeckers, Croll & Son thought it necessary to ship the cargo under a borrowed name, and agreed with Cornelius de Vos, of Altona, a port then at peace with all the belligerents, for putting the cargo under his name; the said charter-party was thereupon annulled, a new one made with the master, as if the affreightment were for account of Vos, and the cargo was shipped ostensibly for his account, but remained actually, and *bona fide* the property of the said Messrs. J. M. Croll & Son.

* He adds, it was never in the contemplation of the said [* 207] Messrs J. M. Croll & Son that this property in its real Lubeck character, would be exposed to danger should the vessel be detained by British cruisers; for, although the French had forced the merchants of Lubeck to deliver up all English goods and manufactures, yet the principal houses at Lubeck, and the claimants amongst others, had actually paid their debts to the British subjects, and a secret committee was established at Lubeck for liquidating the whole; and the shipment of the cargo, under a borrowed name, as already mentioned, was not done to infringe or evade the rights of Great Britain as a belligerent state.

For the authenticity of this account, we must rely exclusively on the belief of this British merchant, who has no better means of ascertaining its truth than the representations made to him from distant and interested persons. Perhaps, if the further proofs were introduced, the court would be reduced to the alternative of deciding the case upon the question, whether Voss, who has already committed perjury by deposing to this property as his own, in his former evidence, should be entitled to any credit in the evidence he may hereafter give in support of this claim? His testimony must be directly in opposition to his former depositions respecting the property of this cargo. Nor will the court be inclined to permit a claimant, who has already improved upon the falsehood of this perjured person, to take advantage

The Orion. 1 Acton.

of his future testimony, which must be, at least, equally liable to imputation. Indeed, there can be no confidence reposed in any of the parties concerned, since there is strong reason to suspect that they must all have connived, at least, if not actually assisted in carrying this fraud into execution. No arguments, therefore, for the introduction of additional proof are admissible.

[*208] *As the case stood, the admissions of the claimant are decisive in favor of the right of his Majesty. The Swedish nation being then the allies of Great Britain, it was also her duty to support Swedish rights. The claimants confess an intention to defraud the rights of Sweden in the event of capture. It is remarkable, however, that this fraud continues to be acted upon even after the vessel had passed the sound, when all danger of capture by Swedish vessels might be considered nearly at an end; as the danger was merely local, and confined to her navigation in that part of the Baltic which encompasses the southern part of Sweden. Why were not these false representations abandoned, and fair descriptions of cargo resumed as soon as the apprehensions entertained might be considered fairly at an end? The only rational answer to such a query is, that these misrepresentations were actually adopted with a further view to defeat British belligerent rights, and continued with that intention. Under the Danish flag, at that time, the vessel might proceed through British cruisers in safety. Whilst the ships of Prussia, and of Lubeck, were subject to great restrictions in their trade, imposed by his Majesty's orders in council, about that time, first subjecting them to capture, and subsequently¹ permitting Lubeckers to trade between neutral ports. The danger of seizure by Swedish cruisers was, therefore, not the only motive for trading under Danish sanction, since equal danger was to be apprehended from British cruisers, as this vessel was prosecuting a voyage prohibited at that time, by an order of his Britannic Majesty in council, under which he would have been liable to condemnation.

[*209] **Adams and Stephen*, for the claimants. When the distressing state to which the city of Lubeck has been reduced by the cruel policy and restrictive decrees of France is considered, the court will probably be induced to relax the strict measure of justice in favor of these unhappy people, especially where it is a question between the Lubeckers and the crown. That false papers are to be

¹ See instructions of the 18th February, and orders of the 25th November and 10th December, 1807.

The Orion. 1 Acton.

taken strongly against claimants requesting permission to introduce further proofs, must be admitted generally. But such has been the change which has taken place in the mercantile transactions of nations at the present day, that on the continent, a considerable part of the import and export trade is carried on through the medium and by the assistance of misrepresentation and false documents, in the same manner as we now obtain Russian cargoes here. So generally has this practice prevailed, that even the authorities themselves have been induced to facilitate the system by granting certificates of affidavits relating to such property, when, in fact, no such affidavits have ever been sworn to. Hence it does not necessarily follow, that should the court be disposed to admit the proofs required, (of which a list is enumerated in the papers of the cause,) it would have to decide upon the degrees of credibility to be attached to the former oath of Voss, or that which he might perhaps now take to disprove it. Probably he had not made any previous asseveration in order to obtain that certificate. In a moral point of view certainly, applications of this nature cannot be sufficiently discouraged. No indulgence should be granted to a party making a false oath for a fraudulent purpose. But such is not the view this court will be disposed to take of this transaction. It will consider it distinctly as a question * of national [* 210] relation between those countries whose rights, either absolute or assumed, may be evaded by the course pursued. How far the fraud may be justified by circumstances, is the only question that remains for the decision of the court. In the argument adduced on the opposite side, it has been conceded, that should the deceit be discovered not to militate against British rights, either in act or intention, that it would not be here considered so reprehensible. This was abandoning the morality of the case altogether, and conceding that it was to be decided merely in reference to its political effects. If even it should appear the rights of our ally, the king of Sweden, have been attempted to be violated, it will be discovered to be merely a consequence of the unhappy situation into which these unoffending neutral merchants have been driven by the intrusion of the enemy. If the further proof shall be considered admissible, the claimant proposes to introduce, not his own attestation or that of Voss, both of which might be objected to, but that of disinterested persons. He must, and unquestionably ought to prove, that the mask has been assumed solely for the pleaded purpose. The claimants appear certainly *in misericordia*, and solicit an indulgence which under no other circumstances they could expect to obtain. But when there appears so much fidelity, punctuality, and strict neutrality in the conduct of the merchants of Lubeck in trade with, and relation to this country,

Le Bon Aventure. 1 Acton.

notwithstanding the possible danger which might result from pursuing a line of conduct so directly in opposition to the views of the enemy. When the extreme embarrassments and difficulty which obstruct their remaining trade are recollected, the court will probably relax the strict rule of law, and permit these further proofs to be introduced.

[*211] *JUDGMENT.

SIR WILLIAM GRANT. Is there no precedent in the recollection of counsel for such an extension of indulgence? We ourselves are not aware of any. The whole seems to have been assumed as a mask to deceive either Swedish or British cruisers, and not at all for the purpose of obviating any danger to be apprehended from France. We cannot, therefore, permit a party to introduce additional proof with respect to a transaction evidently calculated to defraud our belligerent rights or those of our ally.

Pronounced against the appeal.

LE BON AVENTURE, Lamoriniere, master.¹

February 24, 1810.

Asserted joint capture on the part of an associated squadron. *Onus probandi* altogether rests with the party setting up the claim.

In the absence of other evidence, the ship's logs introduced: referred to the Trinity Masters. To impeach their decision, necessary to point out obvious neglect; since they must be considered the best judges of such evidence.

The general presumption that the actual captor did his duty in making signals when they could be made with effect, &c. Necessary to remove it by positive evidence.

AN appeal was prosecuted in this cause from the sentence of the High Court of Admiralty, pronouncing against the interest of the fleet, with which the actual captor had been associated at the time, the capture appearing to have been made out of sight of the fleet by his Majesty's ship Albion, and in sight of The Naiad, one of the vessels composing the said squadron, but which had parted from the main body the evening before, for the purpose of proceeding to Plymouth with two prizes in company. The claim of The Naiad, to

¹ [For cases as to joint captures, see The Nordstern, 1 Acton, 128, note.]

Le Bon Aventure. 1 Acton.

share as joint captor, was, therefore, admitted in the court below, where, in order to obtain a more early decision of the cause, Captain Ferrier, of The Albion, being then in the East Indies, and his return uncertain, his answers to the allegations on the [*212] part of the fleet were waived by consent, on certain facts pleaded being admitted by his proctor on his behalf, a minute of which was filed 20th March, 1807, whereby the king's proctor admitted, that a strange sail appearing, The Albion chased from the fleet by signal, and having captured La Petronelle in sight of the fleet, went in chase of the prize in question without any further communication, or receiving any further signal for that purpose.

Dallas, for actual captors respondents. The allegations of the asserted joint captors in the court below, consisted of several articles, of which Captain Wallis of The Naiad, in the absence of Captain Ferrier, admitted only the three first, pleading certain general regulations, namely : 1st. That when several of his Majesty's ships are associated together and form a fleet or squadron under the immediate direction, orders, and control of any rear-admiral, vice-admiral, or admiral, commodore, or other commander, it is an uniform and positive regulation in the British navy, that no ship attached to or belonging to such fleet or squadron is permitted, on any pretence whatever, (wind and weather excepted,) to part company from or go out of sight of such fleet or squadron, without first obtaining or receiving orders for that purpose, by signal or otherwise, from the admiral or commander-in-chief thereof; and that it is the positive and bounden duty of every captain or commander of a ship, attached thereto, to adhere strictly to this regulation. 2d. That when a fleet or squadron of British ships are cruising together on any service, which may, on an emergency, require the joint coöperation of the whole, it is a regulation in the * service, that during the course of the night they keep as [*213] close to each other as the order of sailing and other circumstances will admit; and at daybreak in the morning the several ships composing it are usually directed, by signal from the commander-in-chief, to spread themselves in various directions, so as to occupy a larger space, and thereby the more effectually look out for and annoy the enemy; and they are at perfect liberty to examine all strange sails passing near or through the fleet, provided only that they can do so without the risk of parting company; and every commander of a ship which discovers a strange sail is bound to make the same known, by signal, to the admiral, and to receive his directions previous to proceeding in chase; and if any of the said ships should, from unavoidable necessity, part company without any order for that

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purpose, they are to use every endeavor to join the fleet as expeditiously as possible.

In addition to these articles, the actual captors admit the several vessels now claiming as joint captors, together with The Albion and Naiad, composing the cruising fleet off Brest, in May, 1803, under Admiral Cornwallis, commander-in-chief, under orders from the admiralty to observe the movements of a French squadron then nearly ready for sea; also to prevent supplies reaching that port, and to intercept certain French ships of war then returning from the West Indies. On the 5th June, 1803, Captain Ferrier, being on the lookout, discovered a sail in the north-west quarter, steering north-east by north, to which he gave chase. Whilst in chase, about half-past eight o'clock, the remainder of the fleet bore up by signal, and made all sail to the south-east and by south, in order to reach their position off Brest. At half-past nine he boarded the chase, [*214] which * proved The Petronelle, French brig. The two vessels lay to, with their heads N. N. E., for about two hours, which was spent in securing the prize. About half-past twelve another sail hove in sight, at the distance of five or six leagues in the north-east quarter, and soon after three sail more appeared, still more to the eastward. Chase was given by The Albion to the former, during which, about two o'clock, she completely lost sight of the fleet, which was then steering south-east by south for Ushant, sailing at four or five knots per hour. Having run nearly forty miles to the north-east in chase of the said vessel, he captured her in sight of the three other sail mentioned, which were The Naiad and her two prizes. This vessel proved to be Le Bon Aventure, French merchant vessel, and the prize now in question. It is distinctly denied by the actual captors that any assistance could have been procured from the fleet, had it been required; as they were out of the limits of signal distance during the whole chase, and completely out of sight after two o'clock. Nor was the fleet at any time nearer the said prize than twelve leagues, even when first seen by The Albion; which rendered it impossible for her (a merchant ship) to be seen by the fleet, more particularly as the day was cloudy. The fleet steering south-east and by south, and the prize steering due north-east, the fleet and prize continually increased their distance from each other, which, at the capture, had increased to at least twenty leagues. Upon the facts of this case the evidence is frequently contradictory; indeed few of the most material are admitted by both parties to have taken place in the same manner. Upon the respective distances of

The Albion and the prize from the fleet, a diversity of opinion prevails. It is, however, admitted * by all parties The

[*215]

Le Bon Aventure. *1 Acton.

Albion separated in the morning, in consequence of a signal communicated to her from the commander of the fleet. The duty enjoined was the chase of La Petronelle. The order was complied with and the duty fulfilled as soon as the prize was boarded. It does not appear that, after this first chase, any signal was made by the commander of the fleet; or that a signal might have been made respecting this last vessel, (Le Bon Aventure,) by Captain Ferrier to the admiral, but was not made. This is of material importance in the cause. This chase cannot possibly be referred to the first order, which had one specific object alone. Here even the case for the asserted joint captors must fail; since, if out of signal distance at the commencement of the chase, or if within signal distance and no signal was made by the fleet to him, or by him to the commander, respecting this particular vessel, and afterwards the vessel was overtaken out of all reach of assistance from the fleet, in neither case could such a capture enure to the benefit of the fleet. The title to share in this instance, on the part of the fleet, is made first through a supposed performance of duty, when it rests upon the presumption that The Albion only performed this latter service as part of the duty enjoined by the signal to chase La Petronelle. And again made on a supposed breach of duty, when it is said that, as he neglected to make signal before he proceeded in chase of the ship now in question, the neglect must enure to the benefit of his associates, as much as if he had made such signal and received orders to chase. This latter is contained in the second reason in the case for the appellants, notwithstanding that it is positively stated, in their original allegation, that Captain Ferrier did, * in [*216] virtue of the first signal, chase this prize, without considering himself as violating any of the general regulations of the service, recited in the two first articles of the said allegation.¹ The reasons annexed to the case of the appellants are three. The first rests on the fact of sight by the whole fleet, on which a right to share is founded. The second raises a new title by impeachment; and states that, because at the time The Albion went in chase of the prize in question she was within signal distance of the fleet, and of which she continued to form a part, it was the absolute duty of her commander to have communicated with the admiral commanding the squadron before he so went in chase, and the omission thereof cannot divest the fleet of the right to share, and entitle The Albion to the sole benefit. The third affords another objection, founded on the

¹ *Vide supra.*

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insufficiency of the evidence produced in the High Court of Admiralty; because the entries in the various logs, which formed the principal ground of decision on the question of sight in the court below, are so manifestly inconsistent and contradictory, no reliance can be placed upon them, in opposition to the positive testimony produced on the part of the fleet.

In that court the first title raised, that of sight, has been decided principally upon the strength of that evidence, to which an exception is made in the last reason adduced. This question applies to three periods; the commencement of the chase, any intermediate part, and its conclusion. If there appear a contrariety of evidence between the actual witnesses and logs, it still must be considered a nautical question, into which the court below would not go, but referred it to the examination of the gentlemen of the Trinity House. The [* 217] high professional character of those gentlemen renders their evidence, in all matters of this nature, most desirable and unexceptionable. They have considered it impossible, on a review of the logs of the fleet and actual captors, that the prize should have been seen by the fleet during the chase. The court acceded to that opinion, as will, probably, your lordships. On the second reason it will be proper to inquire, can such a breach of duty as that imputed operate so as to divest the fleet of its ordinary right to share in conjoint enterprises? Will it enable the actual captor to set up an exclusive title? It does not appear there is any rule of law existing that determines a breach of duty will entitle the commander, under whom the officer thus guilty of a breach of duty acts, to share in the same manner as though he had performed his duty. In the case of *Harvey v. Cooke*,¹ where it appeared that Captain Milne had deserted his station without orders, and undertaken an enterprise out of the limits of his instructions, it was held that the admiral's claim to share in a capture growing out of this disobedience was invalid; inasmuch as it could no longer be supposed that any constructive assistance and direction was afforded, or could have been afforded by the admiral, upon which alone his claim to share could have been founded; and the opinion of Mr. Justice Le Blanc turned more emphatically upon the policy of coming to such a decision for the general interests of the fleet. The same principle is sanctioned by the judgment pronounced in the case of *The Robert*.² Upon this part of the case our inquiry should be directed to ascertain, not whether the fleet and the actual captor were in sight of each other, but whether

¹ 6 East, 220.

² 3 Rob. 194.

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they were within signal distance during the chase, assuming (what is by no means granted) that it was his duty to have made a fresh signal; for although it might have been eligible, in the opinion of the admiral, * to order The Albion to give chase [* 218] in the morning, circumstances might have rendered it ineligible after twelve o'clock of that day; yet if no signal could be made with effect, its omission by Captain Ferrier was not a breach of duty, but merely the result of a conviction, on the part of Captain Ferrier, of its inutility. Upon this fact, where is the preponderance of evidence? Two persons on board The Ardent — one a midshipman, Essel, the other, Captain Bell, of marines — say, from the position of The Ardent, signals might have been made to her by The Albion, and repeated to the fleet. This evidence is not only suspicious, as coming from releasing witnesses, but it is remarkably singular that the evidence of sight by the fleet rests upon the testimony of two persons whom it is natural to suppose would be the least likely to have taken accurate notice of such an event, from their situations and occupations on board. The master of the prize states he was captured by The Albion, in sight of three British frigates. In this, however, he is not borne out by his own second captain, who only states the capture was made in sight of The Naiad. It is, therefore, fair to infer the other vessels, her prizes, must have been mistaken by the master for frigates. No mention is made of the fleet being in sight, although a witness on board the prize very vaguely states the capture took place in sight of The Naiad, other ships of war, and merchant vessels. Upon such evidence of sight the court cannot admit a claim, founded upon possible constructive assistance, to the prejudice of actual captors. No evidence for the fleet has been adduced from persons on board the admiral's ship, although it is probable a stricter attention was paid to every occurrence of this nature on board her, being the repeating vessel, than any other vessel in the squadron. The journals of Captain Ferrier and his two lieutenants * state positively they lost [* 219] sight of the fleet at two o'clock. A lieutenant and master's mate of The Albion, both releasing witnesses, doubt whether The Albion could have seen or exchanged signals with the fleet at the commencement, and deny that the fleet could have seen the prize during any part of the chase. Nor can any reasonable doubt be entertained on the subject, the prize being distant from The Albion, at its commencement, twelve or fourteen miles, The Albion five or six leagues from the fleet; both these vessels steering north-east, and the fleet south-east and by south, their distance from the fleet must have necessarily increased until the chase concluded, when they

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could not be less than forty or fifty miles asunder. In addition to this evidence, the opinion of the Trinity Masters, corroborating the statement of the actual captors, which opinion was deduced from an accurate examination of the logs of the different vessels composing the squadron, must be conclusive of this case, and lead the court to confirm the sentence appealed from.

Adams, same side. It has been often repeated here and in other courts of prize, the ground of constructive coöperation is not one which should be very much extended; whilst the claim of actual captors should from every motive of policy and justice be favorably received. On the question of sight, upon which the present claim is founded alone, can the court interfere between the Trinity Elders and the parties? Can these persons be supposed to be influenced in the opinion given? Or rather what impartiality and accuracy should there be expected in the proceedings in the court below when the court is found associating itself with them in the investiga-

[* 220] tion? To see a chance, so as to entitle the persons * seeing,

it is absolutely necessary that the chasing and the chased be in sight. The decision upon which the court below acted positively negatives the possibility of such a view of the prize by the fleet; and the court will act judiciously in adopting this opinion rather than resort to ships' logs and journals extremely unintelligible except to naval men, in order to form for itself a conclusion as to the relative distances and bearings of these vessels.

Much reliance is placed no doubt upon the circumstance of the association of these vessels at the time. The Albion appears to have been detached *de facto*, and that in consequence of the performance of a duty enjoined by the commander-in-chief. This was a duty specifically enjoined and solely pointed to the capture of La Petronelle. If there had been any culpable omission on the part of The Albion, why have not those so fond of setting out the regulations of a fleet associated together under one head, preferred an accusation against Captain Ferrier? They are aware it would not be prudent, yet here they have the temerity to bring a charge against a meritorious officer of *negligentiae dolo proxima*, if not of actual deceit itself. The Ardent, Venerable, and other ships of the fleet, who it is contended saw the chase, have been guilty of an extraordinary oversight in not recording that fact in their log-books, which must have been known at the time to be most material to their interest. The directions and regulations pleaded as the foundation of this extraordinary claim if carried to their greatest length would be productive of very great inconvenience, and tend so materially to procrastinate

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the operations of war, that vessels of the enemy would often be enabled to escape in sight of a numerous squadron. If it were a *question upon the right to share in the flag-eighth of [* 221] a prize captured under these circumstances, it might with more consistency and effect be argued that the second chase might be legally considered as a consequence of the detachment upon the first, and that by such a detachment the flag-officer or officers were entitled; but were the claim of such officers even admitted as established, it would not in the least illustrate the matter now at issue. Here the question relates to the several interests of every party in the fleet who by a forced and overstrained construction of regulations, manifestly open to exceptions, are to be considered entitled to share in a capture where even the fact of sight at the time of capture is only attempted to be sustained by one of the claiming ships.

Jenner, for the fleet. If the fact of sight, so distinctly proved by the witnesses from on board *The Ardent*, were not sufficient to sustain the claim of the fleet, still the validity of this claim must be admitted as a consequence of the detachment of *The Albion* by the command of the superior officer. The detachment to chase a strange sail in sight must also be supposed to include a discretionary permission to chase any other suspicious sail. Indeed, it must in the true spirit of naval warfare be considered part of the duty enjoined, especially as one of the objects, and a principal object, of this as well as of every other cruise, was the interception of the trade of the enemy. In our allegation it is assumed that Captain Ferrier thought it unnecessary to make a fresh signal from a conviction that he was merely performing a duty imposed on him by this detachment from the main body of the fleet. Though it certainly was a part of his duty to have made a signal in order that he might be provided with instructions *from the admiral, yet if he proceeded im- [* 222] mediately to chase, apprehending it to be his duty, he must be concluded to be still acting under the signal made by the admiral. If this should, however, appear a material neglect of duty, he cannot be permitted to derive any advantage from that which is in itself culpable. No fraud is imputed to him, yet, from the regulations pleaded in the allegation, it must be acknowledged he has been guilty of a great omission, and it cannot be for the interest of his Majesty's service that such omission should be encouraged in courts of prize by construing the omission most favorably for the civil interest of the offender. The decision in the court below was principally guided by the opinion given by the Trinity Masters. This was formed from a review of the logs of the various vessels composing the fleet. To

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both of these we object, to the logs as full of glaring inconsistencies and self-detected inaccuracies, to the Trinity Masters as incompetent judges; whatever experience they may possess is confined to the navigation and practice of merchant vessels, but they are totally incompetent to decide a question of this nature upon a review of the logs of men-of-war, whose mode of sailing on a cruise is singularly complicated and uncertain. To ascertain their bearings, distances, latitude, and longitude, is a matter of considerable difficulty to those on board, and great inaccuracy in general pervades the entries of such vessels logs. In the present instance the entries are totally irreconcilable with each other. The Trinity Masters then taking their data from imperfect documents, and being unacquainted with the practice of ships of war, cannot be right in their determination. The court will, therefore, see the necessity of referring this matter at issue to more competent judges of the logs and practice of ships of war.

[* 223] *Adams observed, it was immaterial whether the particular entries were or were not perfectly accurate, since the Trinity masters worked the loss for themselves previous to their coming to any decision.

As long as these entries are considered part of the data upon which they proceed to determine, that determination must be liable to error. A blank chart was placed before these gentlemen, and they were required to point out the actual position of the vessels composing the fleet at the time, and ascertain whether any were in sight at the capture. But this could only be done by inference from erroneous documents, which they had not the practical knowledge to correct. This practical knowledge it is suggested is to be found in the officers of his Majesty's navy, and to them the question may be referred with more satisfaction to all the parties concerned. The positive evidence of the fact is minute and satisfactory. The lieutenant of the prize speaks distinctly of other ships of war and merchant vessels in sight. He could scarcely be mistaken. Captain Bell of the marines says, both The Albion and prize continued long in sight of the whole fleet during greater part of the chase. At three o'clock several were then in sight, and at the commencement of the chase The Albion was within signal distance of the fleet. He was placed in the best possible situation to be enabled to speak distinctly to the fact, The Ardent being on the look-out to the north-east, at a distance from the fleet, and the chase continuing in that direction. Essel, midshipman on board The Ardent, deposes to the same effect. It is asked, Why have not other witnesses been examined from on

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board other vessels? The answer is obvious. As the situation of this vessel was best calculated for observing the chase, the claimants *naturally inferred they should thence derive the [* 224] least controvertible evidence of the fact. The fleet must be considered entitled to share upon another principle, independent altogether of the facts of sight, namely, that of joint coöperation on a particular service under a particular commander-in-chief. What distance, or whether any, would remove the responsibility under which he acted, so as to render any prizes made by him at such a distance exclusively his own, is a question here unnecessary to examine, since it is evident from the logs of the fleet, that at the time of commencing the second chase The Albion's distance from the fleet did not exceed nine or ten miles, although one of the witnesses on board her has stated it to exceed twenty. She must, therefore, have been within signal distance, and might have waited for instructions respecting the strange sail had not Captain Ferrier considered the chase as a part of his duty as an associated officer of the squadron. If it were for a moment supposed that the neglect arose from a wish to avail himself of a pretext to set up an exclusive title, the disposition of the court would be to defeat the fraud, as has been already expressed in the case of The Robert; and also in the case of The Herman Parlo,¹ mentioned in that of The Waaksamheid,² where the captor, though associated, extinguished his lights to prevent any other vessels seeing the chase; the court acquiesced in the argument that it would be very improper to let the neglect or fraud of a party enure to his benefit; a considerable part of the argument in this case as well as in that of The Woxenhithe is particularly applicable to this case, so far as proceeds upon the assumption of neglect on the part of Captain Ferrier; and here it may be proper to observe, that it does not *immediately follow, as has been [* 225] argued, that if an officer be guilty of neglect he should be immediately brought to trial by a court martial; as in cases like the present where degree of the offence against naval regulation is comparatively small, owing to the latitude of discretion assumed by officers under similar situations. Hence, though no notice may have been taken of the neglect by the admiral at the time, they are perfectly at liberty to raise the objection when it is attempted by the offender to render this neglect a substantive ground of a civil right to their prejudice.

¹ Lords, April 12, 1785.
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² 3 Rob. Rep. 3.

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February 28, 1810. *Stephen*, same side, argued at considerable length on the inaccuracy of the logs offered in evidence, not only with respect to the bearing of each vessel, but even with respect to the bearing of a common point or headland, Ushant. No notice had been taken even in the appearance of *La Petronelle* in the admiral's log. The bearing of Ushant had been described in the journal of one of *The Albion*'s lieutenants as distant twenty-three miles; by another lieutenant's journal on board the same ship as many leagues. "With such journals," he argued, "what could be done by the Trinity Masters to ascertain the point in dispute, whose judgment in matters of this nature had often afforded a subject of successful mirth and derision to a late civilian of eminence in this court and that below?"¹ Admitting even the maxim *cuilibet in sua arte pretendum*, here their skill must be unavailing, since the documents submitted to them are perfectly irreconcilable with themselves, or with any thing which they

have been accustomed to examine and determine upon. They

[* 226] generally calculate * upon the progress or situation of merchant ships at stated periods, which vessels proceed uniformly and with as little deviation from a straight line as possible to their respective places of destination. This mode of calculation is not applicable, therefore, to vessels cruising in a zig-zag direction for several days or weeks, until their reckonings become so intricate that they can scarcely tell where they themselves are. The admiral has not been examined by either party, his memory being a perfect blank as to this capture. When the joint coöperation is so distinctly proved, there should be some presumption of the fact of sight when both, that day and the day after, the vessels were in conjunction pursuing the same object in sight of each other. This presumption, aided by our positive witnesses, may be sufficient to satisfy the court, although it is admitted that the proof lies upon the claimant. If proof of this nature will not be admitted, but the court will, in all cases, hold the fleet coöperating to strict proof how it may effect the service, it may not be easy to calculate, but it will, no doubt, materially increase the aptitude to litigation amongst the fairest claimants, and cause both this and the court below to overflow with business, whenever the prizes made may be worth the trouble or will defray more than the expenses of the suit. It may, therefore, be a question of serious importance to the court, whether a rule should not be adopted, that where a general and strong presumption of the necessity of sight being had at the time, naturally arises, vessels

¹ Doctor Lawrence.

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claiming on the grounds of joint enterprise or association should not be suffered to avail themselves of general and probable evidence of the fact instead of more weighty and direct proof.

On the second point at issue between the parties, relating to the actual captors being within signal distance, it is necessary

*to remark, that a vessel circumstanced as 'The Albion, [* 227] being within signal distance of another vessel associated and capable of communicating with the fleet, amounts to the same as though she were within the reach of a direct signal from the admiral's ship of such associated squadron. This is proved to be the exact situation of 'The Albion by the officers of 'The Ardent. This vessel must have been within signal distance of the fleet when the chase commenced, since, from calculating the number of knots sailed per hour by the fleet and 'The Albion in different directions, (the fleet four or five knots south-east by south, 'The Albion, north-east, eight knots,) at two hours after the chase commenced, the greatest elongation of 'The Albion from the fleet could not amount to twenty-five miles; this was the precise time when sight was lost. Now it has been considered, that signal distance is about two thirds of distance sight; that is, when the lower yards are out of the water. Hence, if the fleet were in sight at half-past two, it must have, at least, been within signal distance at the commencement of the chase, when the fleet and chaser were so many miles nearer each other. The accuracy of this calculation and inference is sustained by the positive evidence of Captain Bell, Mr. Essel, and the master of 'La Petronelle, whilst the releasing witnesses examined for the actual captors, speak with great hesitation, and only express doubts of 'The Albion being within signal distance. When releasing witnesses will go no farther, it ought to give rise to a strong presumption of the fact. It has been argued, that upon such doubtful grounds it would be unfair to let in a claim to the prejudice of actual captors. It was not the fault of the claimants that the fact is doubtful.

Why did not Captain Ferrier hoist *a signal to ascertain [* 228] the fact? It would have removed all imputation of neglect of duty or unfairness of design. They allege it as an intolerable inconvenience to an officer chasing by signal, after making one capture, to be obliged to wait for a fresh signal to proceed in chase of another strange sail. He would have only to hoist a flag for that purpose, which would have been immediately answered if seen. If not, he might have consulted his own judgment and discretion. It would occasion no loss of time, since the signal might, perhaps, be made whilst putting about. Since no signal was attempted to be made, although it was the duty of the chaser, the fact ought to be presumed

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to be with the fleet, and the consequences should be the same as if the signal had been made and permission granted. The case of Captain Milne has been referred to as analogous, whereas it appears he had actually violated his express orders not to remove from the station, which violation received the sanction of the Lords of the Admiralty expressly founded on the urgency and necessity of the case; and the question in the case was altogether different, turning on the proclamation relating to the right of flag-officers to share in captures presuming to be made with their aid and direction. Admiral Harvey could not be considered either directing or assisting in what was a positive breach and disobedience of his orders. Whatever might have been the result of such an undertaking, no prejudice to the admiral could arise. He could have no part in the subsequent gain or loss consequent upon this act of disobedience. In the case of The Herman Parlo relating to the extinction of lights by one vessel chasing in company with another —

[*229] * COURT. SIR JOHN NICHOL. "From a note which I took at the time the judgment in that case was pronounced, the determination of the court appears to have proceeded on different principles from that assumed in argument to-day. It was laid down, that a ship giving chase in company, the supervening darkness should not prevent a joint capture, though it were made only by one out of sight of the other, provided the chase were continued by both. Lord Camden observed, that The Ranger had been ordered to carry the lights, whilst the other went to take the Dutch ships. The lights were, therefore, put out by previous consent, and no *mala fides* appeared in the case."

No doubt the court will adjudge this case in the true spirit of a court of equity; and as in a case where the proceeds of an inheritance have been directed to be invested for the benefit of the heir, and have not been invested, a court of equity will suppose it done since it ought to have been done, so here your lordships will presume that signal which ought to have been could have been made. In the judgment pronounced here in the case of The Diomede,¹ you have sanctioned the principle for which we contend. There a similar question arose. Admiral Duckworth being detached from the Mediterranean fleet in pursuit of a particular French squadron off the Salvages, was unable to overtake this squadron, but hearing of an-

¹ Lords, July 8th, 1809, *supra*, p. 69.

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ther during the pursuit of the former, he proceeded in quest and captured or destroyed it. The question was of extraordinary latitude; namely, whether the commander and flag-officers of the Mediterranean squadron were entitled to share in his captures. The case of *Harvey v. Cooke*¹ was then argued at considerable length, yet your lordships decided in favor of the claim of the [*230] officers of the fleet. The principle in that case is applicable here, although the fact of detachment on a separate service does not form a part of this case. The chase of *La Petronelle*, in the first instance, brings in all the force of the principle of association upon which the judgment proceeded in *The Diomede*. No doubt can be entertained, that had the chase of this prize been commenced by signal from the fleet, the whole would have been entitled to share in that capture.

The danger and impolicy of permitting an associated vessel to maintain an exclusive interest in prizes made when such an association existed at the beinning of the chase, forms another striking feature of this case. No authority whatever is to be found on record in support of such a permission. In the case of *The Vryheid*² the question of conjoint operation is fully considered, and the principles laid down by the learned judge are most favorable to the present claim. The claim of *The Vestal* to share was founded upon her detachment from the captors upon a service in some degree connected with the capture. The judge observed, that the being in sight at the time of the capture, at the commencement of an engagement, either in the act of chasing or in preparations for chase, or afterwards during its continuance, was necessary in order to support a claim of this description. "The question," he observes, then, "comes to this, was *The Vestal* in sight at the commencement of the chase before she separated? If so, it will clearly do; if not, I think as clearly it will not do." Upon this general rule the court, therefore, pronounced against the claim, as the association was broken off and the fact of sight not *proved. By the judgment pronounced in the case of *The [*231] Forsigheid*,³ it would appear that except in case of detachment by orders, or complete separation by accident, a capture made even out of sight, will enure to the benefit of joint captors in every case of coöperation upon a particular service. If it be maintained this case amounts to a detachment, it rests with them to prove the detachment. When did the detachment take place? Was it in chase of *La Petronelle*? If so, (though it is by no means intended

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to be conceded that this service amounted to a detachment, in a legal sense,) as soon as the service enjoined was completed by the known regulations of the navy, it was his duty to have returned. If such a service were permitted to be considered a detachment, there is no such thing as union in any associated squadron to be expected in future; various vessels must be forever detached in this strict sense of the word. But no court will ever be induced to endanger the safety and union of his Majesty's navy by determining that to be a detachment which has before been denominated by a high authority, in a similar case, *The Forseigheid*,¹ "a stretching out the arms of the fleet in a joint service, without dissolving in any manner the connection between them and the main body." Giving up both questions, of sight and signal distance, still, upon the authority just mentioned, the claim of the fleet to share, must be recognized; for, whilst it gives Captain Ferrier a right so to extend the arms of the fleet in order to intercept the enemy's trade, it demonstrates such a conduct to be merely his duty. This right should, however, be derived either from the general nature of the service or the express commands of the admiral, else the whole fleet might be endangered, whilst each might be justifiably employed in chasing, and out of sight of each [*232] other, *without possibility of recall, or immediate reunion upon emergency. It is admitted, that were *The Venerable* seen by the prize, the title of the fleet would be indisputable; yet is it to be held, that where the prize sees the actual captor approaching, the actual captor being in sight of one of the associated squadron, no coöperation exists, and the squadron will not be entitled? This would be, indeed, playing fast and loose with the principle of coöperation to the manifest danger of the service. Whether a capture, after a chase commencing in sight, but continued until out of sight, where finally the capture is made, should enure to the benefit of the fleet with which the captor is associated at the time, is a question of extreme delicacy, and of last importance to the officers of his Majesty's navy, and the decision in this case will materially affect the established principles of union and discipline throughout the British navy, in one way or other.

Dallas, in reply. The questions which, from the printed reasons annexed to the case, it was supposed would have formed the only ground of discussion, are, first, Whether the prize and the fleet had reciprocal sight at the time of capture? secondly, Whether such sight

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was had during the chase? and, thirdly, Was The Albion within signal distance at its commencement? Upon the first, there can be doubt entertained from The Albion being so far distant from the fleet, that, at the utmost, she could barely be within signal distance; and the prize being also very far distant from The Albion, the sum of these distances will produce nearly, or rather somewhat more, than the distance of the prize from the fleet, and prove no such reciprocal sight could be had. When the master of the prize speaks of being captured in sight of three frigates, it is evident he considered

* The Naiad, and her two prizes, vessels of war. Upon the [*233] second question, the evidence is contradictory and inconclusive. But upon both, the opinion of the Trinity Masters is decisive, who, from the most minute investigation, pronounced that none of the fleet but The Albion saw the prize, which also saw none but The Albion. If any objection be raised against taking this as evidence, upon the ground of carelessness imputed to these gentlemen, what can be said of the documents exhibited in support of the claim? The shamefully incorrect logs and journals of the fleet, demonstrate that no reliance is to be had upon them; yet an application has been this day made to the court to refer this to captains of vessels of war, a specimen of whose own journals exhibits so much carelessness and inaccuracy. It should be recollected, the captain is not the person who navigates and steers the ship's course — he merely directs what general course she shall maintain; the actual steering and sailing of the vessel constitutes the duty of the sailing-master exclusively, who is so far answerable for the ship. These masters are all originally examined as to their qualifications by the gentlemen of the Trinity House, and receive their appointments to the different vessels upon the statement and recommendation given them by the Trinity Masters. The state of the wind being ascertained, the general bearings of several vessels known, the logs, journals, and documentary evidence submitted to these gentlemen, who are accustomed to work the logs for themselves, and not to take them as authentic in each detail, can it be maintained their opinion is more liable to be false than that of the captains themselves or any other set of men? Lord Mansfield, when he presided here, upon occasions like the present, would not permit counsel to go into objections * of this nature, but [*234] usually asked, Do you question the skill or the integrity of these persons? If the latter, it rests with you to impeach that which has hitherto been unimpeachable; if their skill, they are generally admitted to be the most competent judges of the matter. Upon the third question, it appears singular, that if Captain Ferrier were so plainly perceived to be chasing a prize in sight, no mention should be

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made of it in the logs of the fleet, and particularly of The Venerable, from whence it is contended she could distinctly be seen, although every other strange sail in sight appears to have been therein noted down with many particulars. The admiral recollects nothing of the transaction. Yet it must be recollected, Captain Ferrier rejoined the squadron a few days after, and saw the admiral, who made no remonstrance, nor thought it necessary to institute any inquiry or call him to a court martial. A strong proof that the captain acted in the exercise of a sound discretion.

To prove so material a part of their case, the appellants rely solely on the evidence of Messrs. Bell and Essel, two persons, perhaps the least acquainted with nautical affairs, and least likely to be upon the look-out, and who have been, in a former instance, discredited. These persons speak positively to the fact of signal distance, whilst our witnesses, both nautical and competent judges, if a competent judgment could be formed, speak with diffidence, and seem anxious not to go beyond their positive knowledge. The evidence is not, therefore, all on one side, as stated. The judge below observed, that as no positive proof had been adduced of The Albion's being within signal distance, it was not fair to infer, that as Captain Ferrier had made the signal on a former occasion the same day, he would have [*235] *neglected to have performed that duty before he had proceeded to chase the second vessel, had that not been prevented by a conviction of the inutility of the attempt, especially as he must have been convinced it could be productive of no exclusive benefit to him, as the fleet would be entitled whether he neglected the signal or not. The proof of being within signal distance, like that of being in sight, should rest altogether upon the asserted joint captors.

From the reasons annexed to the case, it was impossible to suppose the claim would have been founded upon the principle of association and coöperation; different cases having been cited, which are said to bear upon this part of the case; the judge below was certainly perfectly competent to have seen whether these cases were at variance with this decision. In The Vryheid, an allusion has been made to the case of The San Joseph,¹ wherein the whole fleet had been permitted to share with the actual captors, though not in sight. The *onus probandi* was admitted to lie upon the person setting up the construction, but the facts of that case were precisely the reverse of the present. The captors were detached for a particular service, out

¹ Lords, May 4, 1784.

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of which the capture grew, the fleet bearing up all the while to support them. The specific service performed, they perceived another strange vessel, to which they gave chase, and captured out of sight of the fleet. Upon this the question arose, and the fleet were permitted to share upon the principle of conjoint enterprise and actual coöperation, and it was clearly proved the capture would have been made in sight had it not been for the night coming on during the chase.

Captain Ferrier chased by signal one vessel, which he succeeded in capturing out of signal distance; ^{*236} another then [*236] appears, which he also chases, the fleet all the time bearing up for Brest, elongated from the captor and prize in a right angle, without affording any coöperation or ground for inferring this particular chase to originate in a joint enterprise. The case of *The For-sigheid*,¹ referred to a blockade, and strict orders had been given to the vessels afterwards making the capture, not to be out of sight of the admiral's signals. All were associated in the common enterprise of blockade. The prize herself was taken for a breach of blockade. "There was," said the learned judge, "therefore, no severance of the fleet. The admiral was of opinion the vessels were detached certainly from the rest of the squadron, but that species of detachment does not amount to a legal detachment." There is no principle in this case applicable to ours, and the cases cited, so far from illustrating, really weaken the claimant's case.

Much might be urged upon the important effect which the decision in this case must have upon the professional character of Captain Ferrier. He must feel peculiarly anxious for the additional sanction of his exclusive right to share, by the sentence of this court, as he no doubt feels himself placed in a delicate situation with respect to his brother officers, whose presumed interest in this capture he is compelled, by the duty he owes himself and the service, to endeavor to defeat. The prize is also of considerable magnitude, and if the exclusive interest of the actual captors be confirmed, their shares must be very valuable; whereas, should the fleet be permitted to share, the property will be subdivided into so many portions that no material benefit will result to any of the parties.

* JUDGMENT.

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SIR W. GRANT. The principal ground upon which the parties have requested us to refer this matter further is, the irreconcilable inconsistencies discoverable in the logs of the fleet, with

¹ 5 C. Robinson's Reports, 318.

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respect to the particular bearings of these vessels during the chase and capture in question. These, it must be admitted, were however as obvious, or even more so, to the Trinity Masters, to whom they have already been submitted, than they can possibly be to any other set of men, if they really are competent to the duties of their station, in which they have certainly the decided advantage of daily experience. There appears to us no necessity to make the reference required. The inference the court is disposed to draw from all that has been furnished in evidence, or urged in argument, is, that the inconsistencies pointed out are perfectly immaterial, and will not prevent our arriving, in a satisfactory manner, to the point at issue, and to which the court below and the Trinity Masters appear to have directed their attention with equal anxiety. Two vessels, it is obvious, may differ with respect to their alleged situation off a particular point of land, yet their general courses being ascertained, combined with their rate of sailing and other minute circumstances, may afford an opportunity to competent judges for determining their relative distance, or even their distance with respect to a third object. There must, therefore, appear to be an obvious neglect in these particular gentlemen of the Trinity House, to induce us to refer the matter so ascertained by them for further investigation. No such particular neglect is here imputed, and they have decided no reciprocal sight was had at the time of capture.

[* 238] * On the second question (that of signal distance at the commencement of this particular chase) nothing has been said by the Trinity Masters to direct or govern our determination. The *onus probandi* must lie on those who set up the claim. The evidence, however, is extremely defective. In its absence, therefore, the uniform and general presumption that the captain did his duty, must extend to his conduct in this particular instance. It is obvious that, if he had been within signal distance, he might easily have been checked or recalled from the pursuit, had it been thought necessary to do so. Nothing has been advanced to oppose the presumption that Captain Ferrier did not do his duty, except what we are required to infer from the testimony of two gentlemen, Bell and Essel, who must, it plainly appears, have been mistaken, and who, it has been observed, have been formerly discredited on a similar occasion. We cannot absolutely say The Albion was not within signal distance, nor are we called upon so to decide. But it is not proved she was within reach of signals by the party alleging it. Upon the view afforded to the court on this part of the case, therefore, we can see nothing to affect the decision of the court below.

A third reason has been lately urged, which would have been paramount to all the rest, namely, that of association throughout the

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whole transaction, comprising both chases, since it commenced within sight of the fleet. If this were a sufficient ground to support a claim, it is singular it should be resorted to in the last instance, since it would render it perfectly unnecessary to have entered into proof upon the other grounds of claim. Upon this principle, thus advanced, it is necessary to inquire, under *the circumstances of the present case, whether a vessel commencing a second chase, in sight of a fleet of which she had constituted a part before she had been detached, by signal, upon a former chase, and capturing the second chase at any distance from such a fleet, would necessarily, upon this principle, be compelled to let in the claim of the whole fleet, to share in a prize so made, notwithstanding such fleet afforded no assistance or co-operation in the capture, but actually bore away from the captor on another tack.) No such principle has ever been recognized, nor do the cases cited support any such construction of the term association.

SENTENCE.

Pronounced against the appeal, and confirmed the sentence of the court below.

DIOMEDE.¹

February 24, 1810.

Flag-eighth. Commander-in-chief of a station, together with his junior flag-officers, entitled to share as constructively assisting in a capture, made in consequence of the detachment of another junior flag-officer in chase of a particular fleet, which having escaped, and intelligence being received of another fleet cruising in a different quarter, a second chase was commenced without any fresh order, and continued until the capture was finally made within the limits of another admiral's station, one of whose vessels assisted in the capture. The claim of the admiral, in whose station the capture was made, rejected. Claim of a junior flag-officer on another station, who communicated the intelligence which led to the capture, in which he also assisted, admitted.

SENTENCE.

THE court pronounced against the appeal, and affirmed the sentence of the High Court of Admiralty, with respect to the said ship.

¹ See page 69.

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*AMEDIE, Johnson, master.

March 17, 1810.

American slave trade. Transportation of slaves from the coast of Africa to Matanzas, in the island of Cuba, a colony of the enemy, illegal, and affects the property of the ship and her cargo of slaves. The decree of the court below affirmed, condemning the cargo of slaves as prize to the sole use of his Majesty, (which were afterwards set at liberty,) and the ship as lawful prize to the captor. The trade considered to be prohibited by the American law; which, having been officially notified to the court, the neutral was excluded from the benefit he would otherwise have derived from the silence or permission of the law of America, notwithstanding the prohibitory enactments of Great Britain.¹

IN this case an appeal was prosecuted from the sentence of the Vice-Admiralty Court of Tortola, condemning this American ship and a cargo of slaves, as engaged in an illegal trade, from Bonny, on the coast of Africa, to Matanzas, in the island of Cuba.

The *King's Advocate* and *Stephen*, for the captor. The capture and condemnation of this vessel appears perfectly conformable to the existing legislative enactments made by the American government, of which the claimant is a subject, and by the British government, under whose authority the captor, (as commander of a brig in his Majesty's service,) acted. This vessel sailed not until the month of September, 1807, for the coast of Africa, although the letter of instruction and clearance are dated in June preceding. The Amedie and another vessel, The Semiramis, belonging to the same owner, (Mr. Groves, of Charlestown,) sailed in company together, and were put under the management of a Mr. Scott, an Englishman, as supercargo of both vessels, who continued to act in that capacity until these vessels returned from the coast, and parted on the voyage home. The return cargo consisted of 105 slaves, which are described as the sole property of Mr. Groves by the master and mate; but one of the seamen positively swears he heard Martin Robin (the master on the former part of the voyage, but who died on the passage homeward) say, the cargo had been shipped for account of a Mr. de Poe, also of Charlestown. This circumstance, coupled with the [* 241] singular tenor of the letter of instructions to the * master, for the regulation of his conduct in the prosecution of this voyage, cannot fail to awaken considerable suspicion that the pro-

¹ [The Africa, 2 Acton, 1; The Fortuna, 1 Dod. 81.]

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erty is not strictly neutral. What may be the connections of this De Poe does not appear in evidence; but when a witness is found stating, as from very competent authority, that the property is not such as the claimant's witnesses describe, and the vessel is afterwards found deviating to an enemy's colony, in such a case as this, when, at the utmost, a justification can only be set up on the strict letter of the law, permitting the importation to America for a very limited period indeed, but contrary to the conviction of the American government of the disgraceful nature of this trade, and after it had even come to a resolution to abolish it altogether, it is but the exercise of a laudable caution on the part of the court to look upon the whole train of evidence with a scrupulous exactness and suspicion. A short time after leaving the coast, the original master dying, Mr. Johnson succeeded him. He had not known any thing of her previous to the present voyage; the captors, therefore, are deprived of the advantages generally resulting from the examination of a confidential agent. The present master cannot speak as to the usual course of this vessel's trade, or the voyages she may have formerly made. Evidence on this point would have been extremely material, especially as this vessel is found deviating to a foreign port, contrary to the existing laws of America, which commenced the abolition of this inhuman traffic, by prohibiting to its subjects the foreign slave trade altogether; and when so much occasion has been given for suspicion, it cannot consistently be admitted, as in other cases it might, that this deficiency of proof, occasioned by the death of the original master, may be equally, or perhaps ^{*242} more [*242] prejudicial to the interest of the claimant. Mr. Johnson states he understood it was the intention of the former master to proceed from the coast to Charlestown, who had received from his owner instructions to make all possible expedition, so as to reach Charlestown before the 1st day of January, 1808, as the American government had prohibited the African slave trade after the expiration of the year 1807. If he found it impossible to return ¹ "within the time limited by the laws of his country," he was directed "to proceed by way of the old Straits of Bahama to Matanzas, where he should find further instructions to regulate his future proceedings." In obedience to these instructions, Mr. Johnson, on the 22d, he thinks, of December, as nearly as he can guess, considering it impossible from his bearing to make the voyage within the limited time, altered the ship's course and bore away for Cuba. Almost immediately after this deviation the vessel was captured.

¹ Letter of Instructions.

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The first of the reasons assigned by the captors, in their printed case for condemnation of this vessel, is, that "this ship was proceeding from Africa, with a cargo there laden, to Matanzas, in the island of Cuba, being a port of a colony then belonging to his Majesty's enemies, contrary to the prohibitions of the order of his Majesty in council, of the 11th day of November, 1807." The facts of this case prove this capture to have been justified by and within the meaning of the first section of this order; which provides, amongst other things, that "all places or ports in the colonies belonging to his

Majesty's enemies shall be subject to the same restrictions, [*243] in *point of trade and navigation, (with the exceptions hereinafter mentioned,) as if the same were actually blockaded by his Majesty's naval forces in the most strict and rigorous manner," and by no means included within the exceptions which are subsequently enumerated. The vessel appears not only to have been taken in attempting to enter Cuba, but from her long delay in America, not sailing on the outward voyage until September, though her clearance is dated in June, it must be obvious that the owner had in contemplation this destination to Cuba, *ab origine*, and therefore purposely avoided despatching her sooner, wishing her to arrive in the West Indies at that period when the hurricanes had subsided, and the navigation there become safer and attended with less difficulty. If such had not been the original design of the voyage, why was this vessel taken the very day the master asserts he had altered his intention of going to Charlestown, in the intricate and difficult navigation of the West India islands. This was not the natural and usual routine of such a voyage. Had such been actually his intention, he should have taken advantage of the trade winds, and held a more easterly course until he arrived nearly in the latitude of Charlestown. This circumstance refutes the allegation of the master respecting the original intention of the return voyage.

The second reason assigned by the captors states "the voyage was contrary to the prohibitory laws of the United States of America, made for abolishing the slave trade, which have been officially notified to your lordships by the act of the American government in the case of *The Chance*, Brown, master; and although such laws of a foreign state may not amount to a direct or substantive [*244] ground of condemnation in a court of *prize, yet they may and ought to exclude an American claimant from the benefit of those relaxations of the law of war which, in favor of neutral states, have been introduced by his Majesty's instructions, in regard to their commerce with the colonies of his Majesty's enemies; a privilege which can only be understood to be granted to neutral go-

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vernments as a branch of their national commerce, and not as an invitation to lawless individuals to engage in a trade which the neutral state itself has prohibited, and desires to discourage." If it be contended on general principles that a trade to an enemy's colony from a port on the coast of Africa (which may be considered a sort of free port, open to most nations for this particular traffic) is to be identified with that species of trade which has been included within the subsequent exceptions to the order above mentioned, namely, a trade from a port to which the vessel belongs to a port in the enemy's colony, the argument would be inapplicable here, inasmuch as the American government have, by the notification in the case alluded to, disclaimed and disavowed this particular trade; and if it has declared this trade generally to be illegal, it will be for the claimant to show most satisfactorily something in this particular instance to take him out of the operations of the general law. The captors assign as a third ground of condemnation, "that Scott, the supercargo and lader of the slaves, is admitted to have an interest therein, which is liable to confiscation, he being a British subject, by the statute 46 G. III. c. 52." It is remarkable, this person, whose authority over this property seems to have been almost without bounds, is never once mentioned by the master in his examination. The seamen, however, * speak of him as the person to whom the whole [* 245] management of the outward and return cargoes were confided, and, as far as they knew, had no interest in this property, except a commission upon the slaves purchased. It is ascertained that this person had been interrupted in his usual course of trade in this country, had quitted it, and arrived in America, where he immediately embarked in this speculation, being well versed in the African trade. Is it then likely that a man leaving his own country in consequence of his being unable to exert his own capital in the usual way, should be content to be a mere agent for another, and not have a proportion of capital engaged. In the same degree that the claimant seems anxious to keep the nature of this engagement between him and Mr. Scott out of sight, the court will no doubt be inclined to look on its concealment with suspicion. The last reason is of a general nature, and inferential from the former, namely, "There is strong ground to presume the case is fraudulent, and that the property belonged at the time of capture either to his Majesty's enemies or to British subjects trading with the enemy, contrary to their allegiance."

Dallas and Arnold, for the claimants. The weakness of the captor's case for condemnation upon the general question respecting

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colonial regulation, and the operation of the American law as affecting this property, has compelled them to have recourse to the usual arguments to prove the property is falsely described. Yet nothing satisfactory has been offered to the court upon this part of their case.

The proof is all on one side, if we except the evidence of [* 246] one of the seamen, who appears grossly ignorant in * other parts of his deposition upon the most common subjects. The examinations of every other witness, together with the ship's papers, prove the property to be solely in Mr. Groves. Mr. Scott was entitled to a mere commission as agent or supercargo. Such he is described in the letter of instructions. It has been said, the nature of this letter is highly objectionable. By this letter the master is merely directed, should he find himself at too great a distance from Charlestown when in the latitude of the West Indies to arrive previous to the month of January, to make Matanzas. So far from any impropriety in this direction, it must be evident that the intention of Mr. Groves was faithfully and punctually to observe the regulation of his own government, and by no means to run any risk whatever. The American government, by limiting the continuance of the trade, sanctioned that trade during the period so limited; every subject, therefore, was perfectly at liberty to exert his capital as usual during that period, and Mr. Groves had been long engaged in this species of traffic. He was, therefore, a person peculiarly in the contemplation of the American law when the exception was made to the general prohibition. It was to permit such persons to withdraw their capital at leisure from this traffic, a provision perfectly consistent with sound policy and common justice. Mr. Groves, therefore, had a right not only to continue his trade, but to expect that the most liberal allowances would be made in his favor by his own government, should any unfavorable occurrence take place. He had a right to expect that upright intention would constitute, under such circumstances, a

just claim to favor and indulgence. From other govern- [* 247] ments or their enactments he had nothing to fear, * since the right of American citizens to carry on this trade could not be questioned. He was justified in calculating even to the latest moment upon the indulgence extended to merchants in his situation; but more particularly in this instance, when a competent and reasonable time was given for the performance of the voyage. Had the vessel arrived subsequent to the 1st of January in Charlestown, he would, no doubt, have been considered entitled to yet greater indulgence, and under such peculiar circumstances might, perhaps, have been permitted to land and dispose of his cargo. But he had every possible right to give the directions contained in his letter to the master. In fact

The Amedie. 1 Acton.

the letter displays the utmost promptitude on the part of Mr. Groves to avoid any possible breach of the American law. He calculates upon a failure which was scarcely probable, provides a contingent destination for this vessel, and directs the master to proceed to Matanzas. For what purpose? Not for the purposes of trade. Such does not appear to be his intention. But to go there for the purpose of receiving further instructions. What these instructions might be cannot be inferred from the present evidence in the cause, they might have contained orders to set these slaves at liberty, but certainly from the tenor of the claimant's conduct it may be fairly inferred they would not have enjoined any illegal or unauthorized project. To ascertain the nature of these instructions may appear desirable before the court proceeds to adjudication. We are anxious to afford every possible information; but upon the present proof it must be evident that the part of the argument founded upon the assumption that this vessel was taken trading to the enemy's colony is without foundation. The fact is denied, and this case is not included within the restrictions * of his Majesty's orders in [*248] council respecting a trade to the colonies of the enemy by neutral subjects, although it may admit of considerable doubt whether the case of a vessel sailing from such a port as that of Bonny, on the slave coast, to the enemy's colony, can be considered that species of trade prohibited by his Majesty's orders issued during the present war. The proof of property being, therefore, complete and unimpeachable, the court will probably be of opinion, that upon the remaining parts of the case, if there is not yet sufficient proof for restitution, there certainly is not sufficient to sustain the judgment of the court below, condemning both ship and cargo as lawful prize, and will, therefore, direct further proof to be introduced.

His Majesty's Advocate, in reply. It will be extremely difficult to suggest any substantial grounds to support this application to introduce further proof respecting this property. From its nature it is impossible, let that proof be what it may, restitution can be decreed. The slaves have been set at liberty by the crown, to whom they have been condemned, and this in conformity with the law of America. They must appear, therefore, to the court in the same point of view as if they had actually perished altogether. Under almost any circumstances the court would not be disposed to revive them for the purposes of slavery. Suppose a case should occur of justifiable capture, where the property being of a perishable nature, had been destroyed while in the captor's custody, previous to any judicial decision, would that be a case in which a court of justice would decree

The Amedie. 1 Acton.

restitution. Neither would it in the present case decree restitution *in specie*; nor yet give a compensation in the way of damages, ^[* 249] unless something was disclosed strongly impeaching the justifiableness of the seizure. But here the question is simply, will the court strain a point to reinstate this claimant in the possession of these unhappy beings or an equivalent, who appears to have been acting in violation of his engagements to his own government, and under a conviction that in case of capture by British subjects, our prize courts would necessarily take every presumption strongly against him? His personal credibility is much impeached by the circumstances under which the enterprise commenced. Nor can he be considered capable of making proof to the satisfaction of the court, where the property appears *prima facie* subject to confiscation, and the proprietor must necessarily have been liable to severe penalties for the infringement of his own laws had the nature of this transaction been known to his own government.

JUDGMENT.¹ July 28, 1810.

SIR WM. GRANT. In the case of The Amedie it must be considered on the evidence produced to the court, and from the situation of this vessel at the time of capture, that she was employed in carrying slaves from the coast of Africa to a Spanish colony. We are of opinion this appears to have been the original design and purpose of the voyage, notwithstanding the pretence set up to veil the real intention of the proprietor. The American claimant, however, complains of the injury and interruption he has sustained in carrying on his usual and lawful trade, that of importing slaves for the purpose of sale, and calls upon the Prize Court to redress the grievance and repair the damage he has sustained by the capture and unjust

[* 250] detention of this vessel. On the different occasions when cases of this description formerly came before the court, the slave trade was liable to considerations very different from those which now belong to it. So far as respected the transportation of slaves to the colonies of foreign nations, this trade had been prohibited by the laws of America only; this country had taken no notice of that prohibition; our law sanctioned the trade which it was the policy of the American law first to restrict and finally to abolish. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state of which this court could not take

¹ [This judgment is reported in 1 Dod. 84, note.]

The Amedie. 1 Acton.

any cognizance, and, of course, could not be called upon to enforce ; nor could it possibly bar a party in a court of prize. But by the alteration which has since taken place in our law, the question stands now upon very different grounds. We do now, and did at the time of this capture, take an interest in preventing that traffic in which this ship was engaged. The slave trade has since been totally abolished in this country, and our legislature has declared the African slave trade is contrary to the principles of justice and humanity. Whatever opinion, as private individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position as the basis of any of its decisions whilst it was permitted by our own laws. But we do now lay down as a principle, that this is a trade which cannot, abstractedly speaking, be said to have a legitimate existence ; I say, abstractedly speaking, because we cannot legislate for other countries ; nor has this country a right to control any foreign legislature that may think proper to dissent from this doctrine and give * permission to its subjects to prosecute this trade. We [* 251] cannot, certainly, compel the subjects of other nations to observe any other than the first and generally received principles of universal law. But thus far we are now entitled to act, according to our law, and to hold that *prima facie* the trade is altogether illegal, and thus to throw on a claimant the whole burden of proof, in order to show that by the particular law of his own country he is entitled to carry on this traffic. As the case now stands, we think that no claimant can be heard in an application to a court of prize for the restoration of the human beings he carried unjustly to another country for the purpose of disposing of them as slaves. The consequence of making such proof is not now necessary to determine ; but where it cannot be made, the party must be considered to have failed in establishing his asserted right. We are of opinion, upon the whole, that persons engaged in such a trade cannot, upon principles of universal law, have a right to be heard upon a claim of this nature in any court. In the present case the claimant does not bring himself within the protection of the law of his own country ; he appears to have been acting in direct violation of that law which admits of no right of property such as he claims. Ours is express and satisfactory upon the subject. Where, therefore, there is no right established to carry on this trade, no claim to restitution of this property can be admitted. We are hence of opinion the sentence of the court below was valid, and ought to be affirmed.

The Hare. 1 Acton.

SENTENCE.

Pronounced against the appeal and affirmed the sentence of the court below, condemning the ship and cargo as lawful prize.

[* 252]

* THE HARE, Chew, master.

March 25, 1810.

Blockade of Cadiz, whether fairly and legally imposed by a fleet's appearance off the port, prohibiting the entrance of all vessels.

Notoriety of the fact and knowledge of its intention sufficient to bind the neutral. Under such circumstances formal notification rendered unnecessary.

THIS was a leading case of several appeals from the sentence of the Vice-Admiralty Court of Gibraltar, condemning this and several other vessels for a breach of the blockade of Cadiz and San Lucar, imposed on these ports by a squadron under the command of Admiral C. Collingwood, pursuant to an order of the Lords of the Admiralty, dated the 8th June, 1805.

The *King's Advocate*, for the captors. A review of the facts of this case will be sufficient to prove the existence of an actual blockade during the period in which this vessel was taking in a cargo, and which was continued with unabating rigor long subsequent to her departure from the harbor of Cadiz. These ports had been put under blockade by a notification dated the 25th of April, 1805, at which time the appearance of a superior force of the enemy compelled the blockading squadron to retire. In consequence of this interruption the Lords of the Admiralty, on the 8th of June following

[* 253] ing issued an order¹ to Admiral Collingwood, command-

¹ By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

THE Earl Camden, one of his Majesty's principal secretaries of state, having by his letter of the 18th of April last, acquainted us that his Majesty had judged it expedient for the protection of his subjects, and the annoyance of his enemies, to direct that the most rigorous blockade should be established at the entrance of the ports of Cadiz and San Lucar, and that the said blockade should be maintained and enforced in the strictest manner, according to the usages of war, acknowledged and allowed in similar cases, and that his Majesty had been pleased to cause the same to be signified to the

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ing him to enforce and maintain the same in the most rigorous manner, to apprise all vessels sailing thither ignorant of its existence, and endorse their papers to that effect; to detain [*254] all neutral vessels coming out of these ports, having on board goods appearing to have been laden after knowledge of the blockade, but to permit neutral vessels in ballast, (except those which might have entered in breach of the blockade,) or having only on board goods laden before the knowledge of the blockade, to sail from thence without interruption with a similar notice and warning endorsed on the ship's papers. This order, so precise in its terms and strict in its provisions, was enforced and executed by a general order to that effect from the admiral to the several officers upon the station, dated the

ministers of neutral powers residing at his court, and, likewise, from the time above mentioned, all the measures authorized by the law of nations, and the respective treaties between his Majesty and the different neutral powers, would be adopted and executed with respect to all vessels which may attempt to violate the said blockade. We do, in pursuance of his Majesty's pleasure, signified to us by his lordship, hereby require and direct you to employ such part of the squadron under your command, as you shall find necessary, in blockading the entrance of the ports of Cadiz and San Lucar accordingly, and to give orders to the officers who may from time to time be so employed, to stop all neutral vessels destined to those ports, and if they shall appear to be ignorant of the existence of the blockade, and have no enemies' property on board, then only to turn them away, apprising them that the said ports are in a state of the most complete and rigorous blockade, and writing a notice to that effect upon one or more of the principal ship papers; but if any neutral vessel, which shall appear to have been so warned, or otherwise informed of the existence of the blockade, or to have sailed from the last clearing port, after it may reasonably be supposed that the notification before mentioned might have been made public at such port, shall yet be found attempting or intending to enter either of the said ports of Cadiz or San Lucar, you are to direct the said officers to seize such vessels and send them into port for legal adjudication; and in respect to neutral vessels coming out of the ports of Cadiz or Saint Lucar, any such vessel having goods on board, appearing to have been laden after knowledge of the blockade, shall in like manner be seized and sent in for legal adjudication; but neutral vessels coming out of the ports of Cadiz or Saint Lucar in ballast, (except such as shall have entered in breach of the blockade,) or having only goods on board laden before the knowledge of the blockade, shall be suffered to pass, (except there be other just grounds of detention,) with a similar notice and warning to be written upon the papers, prohibiting such vessel from again attempting to enter either of the said ports, and also stating the reason for their permitting her to pass.

Given under our hands the 8th of June, 1805.

(Signed)

J. GAMBIER.
PHILIP PATTEN.
GARLIES.

To Cuthbert Collingwood, Esq.
Vice-Admiral Collingwood, &c., &c., &c., off Cadiz.

By command of their Lordships,

(Signed)

JOHN BARROW.

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23d day of the same month. These orders have been copied from the general order book of the admiralty, and introduced by the captors into this cause. In confirmation of the notoriety of the circumstances attending this blockade, an affidavit has been introduced made by the clerk of the admiral's ship The Colossus, stating that during that blockade numbers of vessels had been warned off or captured in endeavoring ^[* 255] to enter or depart from these ports, and that from all the circumstances, he verily and in his conscience believes this was known at Cadiz and San Lucar to be, from its commencement, a regular and strict blockade, maintained generally for the purpose of prohibiting all commercial and other intercourse whatever with those ports. Further evidence has been adduced to establish this particular fact from the log of the ship Paulina, found in the registry of the Vice-Admiralty Court of Gibraltar, in which are these entries: "This day, (5th June, 1805,) appeared off the port, four British ships of the line and three armed brigs, considered the blockading squadron." "7th June, Admiral Nelson's fleet appeared off the harbor and placed the port in a state of blockade." Upon this incontrovertible evidence, stands that fact which must be considered conclusive as against any application for reversing the sentence of the court below. The immediate circumstances under which the vessel sailed, are as follows: she is admitted to be an American, and sailed from New York to Cadiz, where she took in a return cargo of salt and wine, which was put on board, a small part in the latter end of June, and the remainder in July. On the 21st of July she cleared out from Cadiz; the master must, therefore, be perfectly apprised during the time whilst the cargo was shipping, and at the moment of leaving the port, that he was liable to detention in consequence of this attempt to violate the blockade, which was then so notorious. In order to make out any sort of a case upon which the court might be induced to restore this vessel, it is intended to have recourse to the original blockade, which it appears had been discontinued in ^[* 256] consequence of the appearance of a *superior French force off the harbor. This blockade having been interrupted, it may be contended, that the reappearance of a fleet off these ports, was not, of itself, sufficient to constitute a renewal of the blockade, and that, in order to revive and clothe it with all the legal consequences of a blockade, it was equally necessary it should be regularly notified, and attended with all other usual formalities, as if no previous blockade had existed. The appellant, by his printed case, appears to have assumed these principles as a basis, and proceeds to prove, by papers introduced into this cause from the additional appendix of The Argus.¹

¹ One of the causes on the list for sentence upon a similar appeal.

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that no notification was regularly made of the blockade previous to the capture. These are the certificates of the American and Danish consuls at Cadiz, which state, that a notification, dated the 29th March, 1805, had been received from the British admiral, Sir John Orde, by the governors of Cadiz, informing him, that notwithstanding the existence of the blockade, he was authorized to permit neutral vessels with innocent cargoes, also neutral property, freely to enter and sail from the ports of Cadiz and San Lucar; but that vessels laden wholly or in part with naval or military stores, provisions, and grain, were prohibited as usual. The certificates add, that no other notifications had been since received. In consequence of this notification, various vessels entered and left these ports, and so continued to enter and depart until some time previous to this capture, when, in consequence of the seizure of some neutral vessels sailing from thence, a representation had been made * by the neutral consuls to the British admiral, Sir C. Collingwood, then commanding on the station, complaining of the detention of the said vessels. To which he returned an answer on the 23d of July, announcing that he acted under express orders from the admiralty, to maintain a strict and rigorous blockade on these ports. In referring to the case of *The Hoffnung*,¹ the principle supplied by the judgment in that case, although the vessel was there restored, will be amply sufficient to sustain the sentence of condemnation passed upon this vessel and cargo in the court below. In that case, the learned judge was of opinion that it ought to appear in evidence, that prior to the sailing of that vessel to the port in blockade, from a distant port, the Spanish government at Madrid had been impressed with a distinct knowledge of the fact, so as to have enabled it to have prevented the sailing of *The Hoffnung* from the port in France, before a Prize Court could be induced to consider the property of the cargo fairly subject to condemnation. This, he was of opinion, was not the case; as sufficient time had not elapsed from the appearance of Admiral Collingwood's fleet off the port to communicate the state of Cadiz to the neutral. As to the property of that vessel, it was held, the neutral owner was entitled, in that case, to the utmost indulgence, from the peculiar hardship under which Swedish vessels were then placed, and nothing short of positive proof that the knowledge of the blockade had reached the master of this vessel, would be admitted as sufficient ground for condemnation. And in reverting to this judgment, it must be evident the peculiar circumstances of that voyage, and of the neu-

¹ 6 C. Robinson's Reports, 121.

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tral owner's situation, were the principal reasons for restor-
[*258] ing the property of both ship and cargo. The learned *judge
besides admitted, that there had not been sufficient information
afforded to the court. In the present case all the facts are established,
the time of the arrival of the blockading fleet precisely ascertained, and
the existence of the blockade *de facto* proved, whilst the knowledge
of these facts is brought home to the party, who commences his voy-
age from the point of danger. The established principles upon which
it was, in that case admitted a Prize Court, would necessarily pro-
ceed to condemnation, are all applicable to the case before the court,
and none of the peculiar features which protected that case, are to be
discovered in the present.

Dallas and *Arnold*, for the claim. In referring to the case cited, it
will be found, the leading principle of the judgment upon that occa-
sion is peculiarly favorable to the claim here. It was held, that no
reappearance of a blockading squadron, which had been compelled
by a superior force to relinquish the blockade would renew it, nor
were neutral nations bound to observe it, unless the same formalities
of notice, &c., accompanied the renewal, as were usual in first impos-
ing a blockade. That such a re-appearance was, as to its legal effect,
a blockade *de novo*. The striking feature of distinction in the cases
is, that *The Hoffnung* sails from a distant port and attempts to enter
the blockading port. The justification set up is the impossibility of
her being acquainted with the renewal of the blockade. The prize in
question sails from the blockaded port itself, and it is hence inferred
she must have been aware of her danger. How stand the arguments
urged in favor of the captor? They proceed altogether upon the
assumption that the blockade was perfectly well known in
[*259] Cadiz at the time this vessel *set sail. If so, would not the
attempt to escape have been made in the night? Or would
not fraudulent papers have been put on board to conceal the time at
which her lading had been completed? No such artifice appears to
have been practiced. The fleet, it is true, appeared off the port; but,
as was observed in the judgment on the case cited, that fleet might
have been supposed to be merely one of observation. It was neces-
sary to announce this blockade by proclamation, otherwise neutrals
would not be bound to observe it. No notification, however, takes
place; the prize continues to complete her cargo, and on the 21st
July sets sail in the face of this fleet, and in the middle of the day.
Previous to her sailing a remonstrance had been made by the neutral
consuls to the British admiral, in consequence of his detaining some
vessels sailing from that port. The causes of detention were even

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then unknown, and might have been various. The mere knowledge of the detention of these vessels, if even brought home to the master of this vessel, would have created no obligation on his part. No answer is received by the consuls to this remonstrance until two days after the sailing and capture of this vessel. Then it for the first time appears that it is the intention of his Majesty to maintain a rigorous blockade. Can this bind or affect a party already on the high seas? But to make out a case reference is made to the entry in the log of The Paulina, "supposed to be the blockading squadron;" this vague opinion of the writer is as ineffectual to prove their case as the surmise of the clerk of The Colossus, who presumes that it was believed in Cadiz a regular blockade had commenced. The doubts existing in the mind of the court in the case of The Hoffnung, are by no means cleared up in the present. * It is barely known the British [*260] squadron appeared off the port on a certain day. The same want of information complained of there exists here, and no distinction unfavorable to the present claim, can be drawn between the two cases.

The *King's Advocate*, in reply, observed, there was a very considerable difference in point of information between the two cases. In the case cited, it was only known by the court that Admiral Collingwood appeared off the port on a certain day. Here his intention was developed, and a great body of evidence corroborative of such intentions exhibited. From a list annexed to the communications which passed between the British commanders off the port, and the governor of Cadiz, containing the names of neutral vessels sailing to and from the port pursuant and subsequent to the instructions of the 5th of February, permitting a limited trade to ports of Spain, it appears that vessels had ceased to enter and sail as usual from the 6th of June. Those which sailed were for the most part detained, which circumstance gave rise to this correspondence. This document was introduced by the claimant himself from the papers in the case of The Argus, and was a strong proof of the fact being very generally known, since no vessels availed themselves after that period of any alleged misapprehension of the admiral's intention of being off that port.

JUDGMENT.

SIR WILLIAM GRANT. From the evidence adduced in this cause, originally or since invoked, there can be no doubt that the fact of the fleet having appeared off the harbor must have been known on the 10th of June, and was also considered to have arrived there for the purposes of blockade. From this period to *the [*261]

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shipment of the cargo, which was not completed until late in July, enough must have transpired to display the intention of that squadron. Various vessels were warned off. Previous to that time, in May and the early part of June, many American vessels entered, as appears by the list introduced amongst the papers of this cause. From the 6th of June no more vessels enter the port. This must have been a matter of notoriety and must have excited attention. With regard to the egress from those ports, some vessels sailed subsequent to that date; of these part were in ballast; others perhaps had a right to depart, as being included within the exceptions of the general order in favor of vessels laden before the knowledge of the blockade; upon this, however, we are not called upon now to decide; and some were actually captured, brought in for adjudication, and condemned, of whom there are now a few on our list. The general order did not issue until the 23d of June; yet we can draw no inference that the blockade was not as rigorously kept up from the time of the squadron's first appearing off the port; namely, on the eighth of the same month, as it was subsequent to the general order. We are of opinion it was not so much a blockade recommenced as a blockade *de novo*. From the general notoriety of the circumstances attending it the parties should have considered it as an actual blockade in full force and effect. We, therefore, affirm the sentence of the court below, condemning the property of the ship and cargo as lawful prize to the captors.

SENTENCE.

Pronounced against the appeal and affirmed the sentence appealed from.

The Nostra Signora de los Dolores. 1 Acton.

[* 262] * **NOSTRA SIGNORA DE LOS DOLORES**, Castaner, master.

March 29, 1810.

Joint capture. First question as to the inadmissibility of claim on the part of asserted joint captors, after final condemnation, without previously complying with the requisitions of the act of 45 Geo. III., s. 47, by payment of all expenses incurred by the condemnation. Second question as to the fact of sight at the time of capture. Claim of the asserted joint captor rejected.¹

A SPANISH vessel captured on the 11th November, 1805, was condemned in the Vice-Admiralty Court of Jamaica, as prize to his Majesty's schooner Pike on the 23d December following. On the 17th January, 1806, an allegation was given in that court on behalf of his Majesty's brig Goelan, pleading the fact of her being in sight at the time of the capture. A commission issued for examining witnesses on the part of the actual and asserted joint captor, and on rehearing the claim of The Goelan was admitted, from which decree the actual captor, Lieutenant M'Donald, appealed.

Arnold, for the respondent. The objections made to the claim of the brig Goelan are first, that the fact of her being in sight at the time of the capture is not clearly proved; and, secondly, upon a point of law which is deducible from the act of the 45th Geo. III, intituled, "An act for the encouragement of seamen, and for the better and more effectually manning his Majesty's navy during the present war," dated the 27th of June, 1805, which enacts in the forty-seventh section, "That no claim on behalf of any asserted joint captor shall be admitted before condemnation, unless security be given, at the time of entering the same, that the party shall contribute to the actual captor his proportion of all expense that shall attend the obtaining the adjudication, as well in the first instance as upon the appeal; and likewise his proportion of all * costs [* 263] and damages that may be awarded against the actual captor, on account of the seizure and detention; and after final condemnation, no allegation, setting forth such asserted interest, shall be admitted, unless the party shall have previously paid his proportion of all such expenses as shall have attended the obtaining such final condemnation; and unless he shall have shown sufficient cause to the court, why such claim was not asserted at or before the return of the monition."

¹ [For cases as to joint captures see The Nordstern, 1 Acton, 128, note.]

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On this latter clause of the section the objection in point of law is intended to be raised, inasmuch as the requisitions of the statute have not nor in fact could not from particular circumstances be complied with. Upon this part of the case it is only necessary to state, that the proper place and time for the actual captor to have availed himself of this objection would have been in the court below, when the allegation of Captain Ayscough as joint captor was there filed; even then he might have availed himself of this act, the spirit of which, from its title, appears not to have in contemplation to increase the difficulties which joint captors often labor under from the contrivances of interested persons or the unavoidable accidents dependent on nautical transactions. Many circumstances inseparable from the nature of a naval life, where parties must necessarily be subject to the command of superiors, whose duty it often is to prescribe to particular officers a line of duty or course of voyage from which they may not deviate, might render it impossible to comply in all cases of joint capture with the provisions of this act; but the same spirit

which dictated the act would naturally induce a Prize Court [*264] to make an exception in favor of a claim which had *only been protracted or deferred beyond the usual time by such unavoidable circumstances. On the question of sight, therefore, this case will most probably be decided. A variety of evidence is adduced in the papers of this cause to prove and disprove the fact. The deposition of the master of the prize, and also of the mate, states simply she was captured off Savannah La Mania, in Jamaica, by the schooner Pike, Lieutenant M'Donald, commander, no other vessel of war being in sight at the time of the capture. The reason of this mistake will appear from examining the evidence of the other more circumstantial witnesses. Of those for the joint captor, Chapman avers he was prize-master of The Citizen, which sailed under convoy of The Goelan on the day of the capture, saw The Pike and two other schooners from one to five o'clock in the afternoon; The Pike when first seen was about four miles distant, and close in shore; The Goelan nearly four leagues; the two other schooners running down before the wind. At four or five several guns were fired by one of the three schooners. At this time The Goelan had hoisted American colors, and he was ordered by Captain Ayscough to do the same, for the purpose of deceiving The Pike, which the captain told him he supposed to be an enemy. The schooner that fired the guns hoisted a blue English ensign in the afternoon. This evidence is corroborated in every particular by the mate of The Citizen, who adds, that he saw The Pike make the capture, previous to which Captain Ayscough had warned the The Citizen to keep clear of The Pike, and

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immediately went in pursuit of her. A sailor on board the prize deposes, he saw at the time of the capture a brig which he believes to be The Goelan, about two leagues to leeward; there was a ship to windward, and the schooner Pike between *both; [*265] the ship standing in shore, the brig and other schooner standing off. The brig's intention, he thinks by her manœuvres, was to cut off the schooner, and the commander of The Pike, after boarding the prize said, in broken Spanish, the brig was a companion of his. In this statement he is borne out by the evidence of two other Spanish sailors, who add, that in an hour and half's sailing they must have been alongside the brig, and have been captured by her, thinking her to be an American. The Pike's commander said, on taking possession of the prize, had she escaped him she must have been captured by the brig to leeward, his companion. The other witnesses for the actual captor, four in number, and all sailors on board the prize, principally confine their evidence as to the circumstance of The Pike's bearing a red ensign at her main peak, and aver they were only apprehensive of The Pike's capturing them; one, however, admits there were apprehensions entertained of the ship to windward. Upon the positive evidence, therefore, of five witnesses examined in behalf of the joint captor, and the admissions of the evidence on the opposite side, there can be little doubt the brig alluded to was The Goelan, and in sight at the time of capture, and hence entitled to share.

Carr, same side, was requested by the court to reserve his observations for the reply.

Adams and *Stephen* for the appellant. In appearing for the actual captor, we must in point of law derive considerable advantage from that situation. If our witnesses were merely negative, as has been stated, it would only be then that sort of evidence which the nature of our case will generally admit of. We are *not [*266] bound to establish a case; this is the duty of the counsel for the asserted joint captor; it remains for us to disprove it if established; if not, it falls by its own insufficiency to the ground. The *onus probandi* altogether lies on the claimant. It does not signify whether his claim is rebutted by direct or negative evidence. The strength of the actual captor's case is drawn from the weakness of the others; and if the respondent do not prove that the sight was evident and certain, there is an end of his case altogether. It was presumed that in the act of parliament quoted there was a substantive ground for excluding the respondent from availing himself of

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even a much stronger case than that now before the court. But upon this part of our case the court being of a different opinion, it becomes necessary to compare the conflicting evidence adduced by the parties, and decide upon the question of fact. In examining the evidence as to the fact, a disclosure takes place from the positive testimony of all who pretend to see the brig at the time of the chase, which gives rise to another question in point of law; for this vessel, all say, had American colors flying at the time, and was taken by these witnesses on board the prize for an American vessel. No intimidation, therefore, was given to the foe. Can, therefore, the claimant avail himself of the fact of sight, if even established, when he appears not to have contributed that assistance to the actual captor which forms one striking feature in the principle of law respecting sight, upon which a joint captor is entitled to share? Leaving, therefore, this question to the determination of the court, upon the fact of sight it is obvious that the council have rather endeavored to reason

inferentially that The Goelan must have been the brig mentioned, and must *have been in sight from her situation,

[* 267] than proved by positive evidence that she actually was so. Scores, mate of The Citizen, admits his distance from The Goelan was twelve miles, yet speaks of having been warned by her to avoid the schooner, which proved to be The Pike; which vessel at the time had, he erroneously states, a blue flag flying during the chase. Is it possible a communication of the danger, which Captain Ayscough apprehended from The Pike's being so near The Citizen, could take place at the distance of so many miles? Would it have been consistent with his duty, having then the charge of the trade, to permit an enemy to chase a vessel in sight, and yet continue a distant course, leaving The Citizen in a situation of very great peril? Captain Ayscough, in his answers to the allegation of Lieutenant M'Donald, says the very reverse; stating he saw the capture made, but was not then certain whether the captor was The Pike or his Majesty's schooner Barracanta, both these schooners being so very like as not to be distinguishable at any distance. The four sailors on board the prize say The Pike's flag was red. In each part of his testimony Scores is discredited by positive evidence, or the impossibility of the occurrence to which he positively swears. All the witnesses who speak of The Pike's bearing say the capture was made close in shore, and to the eastward of a high point of land, projecting into the sea a considerable distance, called Pedro Bluff, over which no vessel on one side could see a vessel on the other. The course of The Goelan was to the westward of this point, far to leeward. Under these circumstances it is too much to infer, because

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The Goelan was within seeing distance, that she therefore had sight; for the intervention of this, or different other headlands which are upon that * coast, would have prevented [* 268] ships pursuing such different courses from having any sight whatever of each other; and the probability is, that the nearer such vessels were, the less chance there would be of their obtaining a mutual view. By referring to the chart, it must be admitted that vessels similarly situated as The Pike and Goelan are described at the time of capture, could not have been in sight of each other, but were intercepted by the intervention of the headland at the commencement even of the chase. Here it is necessary to observe upon the manner in which this claim came to be interposed, which is not a little extraordinary. The capture was made on the 11th November; the 24th the respondent arrived in Blue Fields Bay, where he continued three days; but, as he states, employed so actively in watering and refitting, that notwithstanding his alleged knowledge of the capture, and having an interest in her condemnation, he could not spare time enough to send in his claim, though within a short distance of Kingston. He was then ignorant which of the schooners had made the capture; but being soon after acquainted, through the newspapers, that it was The Pike had captured the prize, and falling in with her on the 6th December, he went on board her, to ascertain from the appellant whether he would admit his claim, alleging his having been in sight at the time, which being denied, he requested to inspect The Pike's log, to see whether any entry had been made that day of The Goelan being in sight. The allegation of the appellant more fully details the transaction; adding that, when no such entry was found in the log, the respondent interrogated several of The Pike's crew, respecting the appearance of The Goelan during the chase, which they severally *denied. The appellant [* 269] requested leave to go with him on board The Goelan, and examine his logs, which was done; and no entry appeared of any guns having been fired by any ship in sight that day, (although six had been fired for the purpose of bringing the prize to,) nor was there any entry respecting the capture in question in the log of The Goelan. In examining the log of The Pike, the respondent displays a confidence in the regularity and precision of the evidence which he might extract from it; the deficiency of such evidence is, therefore, to be taken most decisively against him, and as the case for the asserted joint captor is incomplete, the appellant is solely entitled to the prize in question.

Carr, in reply, objected that the allegation of the appellant had

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been adduced as proof generally, whereas in the former adjudication two articles only, out of several, had been admitted, and that for the purpose of obtaining the answers of the respondent thereto. These referred merely to his being at anchor in Blue Fields Bay, and having made inquiries on board The Pike. Taking even the log as evidence, it did not appear that the Bluff intervened between these vessels. Not one of the appellant's witnesses say, that any interruption was occasioned by the intervention of this headland, though the whole of this case seemed to rest upon that fact's being established. The witnesses on board The Citizen spoke decidedly as to these different vessels being all seen by her, and within seeing distance of each other. The Spanish sailors on board the prize mentioned a brig in sight. These being disinterested persons, much reliance might be reposed upon their testimony; such, at [* 270] least, was *the usual practice of prize courts. And, from the body of evidence before the court, he considered his party could have no hesitation in resting the whole strength of his case on The Goelan's being the brig so repeatedly alluded to by most of the witnesses on either side.

JUDGMENT.

The court pronounced for the appeal, declared that the respondent had failed in substantiating his claim as joint captor, and condemned the vessel as prize to The Pike; but directed the respondent's expenses in both courts to be paid out of the proceeds.

PATAPSCO, Hall, master.

May 19, 1810.

National character of the settlements of the Isle of France and that of Batavia discussed. The captor's proofs of the illegality of a trade with these settlements, on the ground of their being of a colonial nature, where, in time of peace, neutrals were not permitted to trade generally, pronounced to be insufficient. Ship and cargo restored, the property appearing to belong as claimed. Captor's costs in both courts granted, in this and the remaining similar cases.

THIS was a leading case of several American vessels engaged in the same trade. The Patapsco sailed from Baltimore to Batavia, in the island of Java, where she procured a cargo of sugar, arrack, candy, and rattans, with which she cleared out for Baltimore, intend-

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ing to touch at the Isle of France for refreshments. On the part of the captors it was argued that, from the nature of the return cargo, which was peculiarly adapted for the Isle of France, and from other circumstances disclosed in evidence, her actual destination was for that island, where it was intended to dispose of this cargo, and, consequently, the asserted destination was false. A question necessarily arose, as to the legality of a neutral trade to and from these ports, and the national character of the settlements of Batavia and the Isle of France, which forms the principal part of the subsequent argument.

* *The King's Advocate*, for the captors. The nature of [*271] the trade in which this vessel was engaged, at the time of the capture, is highly objectionable ; inasmuch as the primary object of the neutral appears to have been to assist the trade of a Dutch settlement, by exporting from thence its staple commodities ; its secondary, the importation of these commodities into a colony of the enemy. The facts of the case are strong, and require little comment. The Patapsco sailed under American colors from Baltimore, with iron, provisions, and dry goods, for Batavia, in the island of Java, from whence she took, in return, arrack, sugar, sugar candy, and rattans, with 19,700 Spanish dollars, with which the vessel was proceeding nominally for Baltimore, but, in fact, for the Isle of France, and was captured in the attempt to enter that island, about four leagues distant from the port, on the 1st of August, 1805. Proceedings were instituted against the vessel in the Vice-Admiralty Court at Columbo, in Ceylon, where she was condemned, as carrying on an illicit trade between Batavia, a colony of the Batavian government, and the Isle of France, a colony of the French government, in alliance with the Batavian *government.¹ [*272] In the depositions of the witnesses on board the prize,

¹ Extract from the printed case of the respondents.

“ The learned judge of the court below, in delivering his sentence, observed (among other things) as follows :

“ Considering that the reasons which the captured give for deviating into the Isle of France cannot be the true ones ; that the excuse set up by them is the excuse which every American ship that ought not to go into the Isle of France makes for deviating into that island, if detained by his Majesty's cruisers ; and that I am bound to consider, with the greatest caution, all excuses of this sort which are made by a neutral, after being caught in the very act of deviating into an enemy's port, I can have little hesitation in coming to the conclusion, that the excuse made by the American for going into the Isle of France is a mere pretext. The circumstance of this ship being found going into the Isle of France, although every paper on board of her

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various inconsistencies are discoverable, which, in themselves, are calculated to excite suspicions of illegal intention on the [*273] * part of the master, and fraudulent concealment in the correspondence between him and the owner, respecting the actual destination of this vessel on the return voyage. The master swears the ship's course was at all times directed to Baltimore, for which port she cleared out on the 10th July, until the 17th or 18th of the same month, when finding the ship was leaky, in bad weather, several of the ship's company in a sickly state, and apprehending he should be in want of water and provisions to prosecute his voyage, he determined to go to the Isle of France. After this determination, he continued to steer without deviation for that island, until the moment of capture.

pointed to Baltimore only; the erasure of the entry about the passenger for the Isle of France, although he was on board at the time she was detained; and the erasure of the entry which had been originally made in the log-book of a destination to the Isle of France, although it is evident it had always been her intention to go to the Isle of France, lead me to infer that the captain thought it necessary to conceal his intention of going into that port, knowing that the purpose for which he was going in was not a lawful one in time of war; that purpose, I think, is sufficiently explained by the nature of the cargo, which consists of rattans, arrack, loaf sugar, sugar candy, and 19,700 Spanish dollars, all articles which are declared by persons conversant in trade to be very well suited for the market of the Isle of France, though by no means to that of America, as appears by the instruction of the owner of the ship. It seems, therefore, to me the natural conclusion to be drawn, that the captain of the ship, having failed in procuring at Batavia a cargo fit for the American market, had taken on board at Batavia one fit for that of the Isle of France, intending to sell it there, and there again to purchase, with proceeds arising from the sale of it, and with the Spanish dollars which he had on board, such produce of the Isle of France as would make a suitable cargo for America. Upon these grounds, therefore, I come to the conclusion that the captain was proceeding from Batavia to the Isle of France with a cargo, the produce of the former place, for the purpose of selling it at the latter place, and there purchasing a cargo, the produce of the Isle of France, adapted to the American market, which I conceive to be carrying on a trade between the colony of one enemy and that of another enemy, which leads me to the third head—Is such a trade contrary to the general law of nations?

“Although my predecessor, Sir Edmund Carrington, has already declared it, in the case of The Penman, to be his opinion, that such a trade is contrary to the rule laid down by the general law of nations, I shall, nevertheless, feel it to be my duty to consider this point a little more in detail than he did, for the purpose of bringing before the Lords of Appeal; in the event of my judgment in this case being appealed from, the various documents which are necessary to enable their lordships to form a conclusive opinion on the most important question of prize law that has ever been agitated in the East Indies.

“In order to enable me to decide this question, I shall consider separately all the Dutch and all the French colonial regulations on this subject, which are applicable to Batavia and to the Isle of France.”

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The outward cargo was consigned to the master, as appears by invoice; and both outward and return cargo are described as the property of an American merchant. The master states there was no passenger on board the ship. There are, however, two entries in the log of this vessel which disprove the testimony of the master respecting this fact, and also his alleged intention to return to Baltimore. The first of these entries is, "Mr. Ch. F. Lepontouin came on board for his passage to the Isle of France." The second [*274] appears to have been made after the ship had left the road of Batavia and proceeded to sea; "Ship Patapsco, from Batavia towards the Isle of France." These three last words have been attempted to be erased, the pen has been thrice drawn through them, and the word "Baltimore," inserted beneath them. Two such entries as these are tolerably strong proof that the original intention of the master, previous to setting sail from Batavia, was for the Isle of France, and by the clumsy contrivance of substituting one destination for another, after he had commenced the voyage, we may fairly infer he was aware the avowal of his intended voyage to the French colony would be attended with danger, and that such a trade was illegal. There is, therefore, upon the facts of this case, sufficient to induce the court to pronounce a sentence confirming the condemnation of this vessel, independent altogether of the question of the description or national and relative character of the ports between which this trade was attempted to be carried on. For, in the cases of The Penman,¹ and Amsterdam Packet,² where the nature of the trade was nearly the same, without any reference to the national character of these ports, your lordships lately decided upon the fraudulent circumstances, and the want of integrity disclosed in the ship's papers and examinations, and proceeded to condemnation upon that ground alone. The same concealment, equivocation, fraud, and insincerity, characterize the present case, and must, therefore, lead to a similar adjudication.

Upon the national character or relation in which the ports of Batavia and the Isle of France may be supposed to stand to the respective states of which they may be considered a part, [*275] this court has never yet come to any decision; when the question might be considered to be in some measure before the court, by the arguments of counsel, in a late instance, your lordships were, notwithstanding, satisfied with an investigation of facts, and founded

¹ Penman, Coffin, Lords, February 20, 1809.

² Amsterdam Packet, Smith, Lords, November 12, 1807.

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your decision upon those facts. Indeed, it appears to be admitted by all, that the nature of these settlements has never yet been ascertained by any judicial determinations upon the subject in the various courts of judicature established in this country for the investigation of civil or national rights. In the absence of all authority, therefore, the most cautious reservation upon this subject has distinguished the court and counsel wherever the question of national character might by possibility have been raised. In an inquiry of such serious importance to the mercantile world in general, it will be the duty of the court to examine with more than ordinary strictness into the nature of the connection subsisting between these settlements and the European powers to whose dominion they are subject, and into the history of their primary establishment and subsequent advancement as strict and close settlements, subject to colonial restrictions in trade, and regulated by an exclusive system of policy with respect to other nations. How far the necessities of war may have constrained these places to relax that system on their own account, will be perfectly immaterial in the present inquiry. And it will, therefore, be attended with least inconvenience to consider these ports as in the situation in which they were in the year 1793, or at the commencement of the present war. A very concise view of the laws enacted by France with reference to the Isle of France, will be sufficient to establish the position advanced. In the year 1712, during the reign of Louis the XIVth, the island [*276] was *taken possession of by a small colony from the French settlements of Madagascar. The general character given to this establishment subsequently, was that of a close and colonial nature. The charter granted to the French company trading to the east, exclusively vested in that company the trade thither, and made it penal in others to trade beyond the Cape of Good Hope. And it is stated by political authorities of distinction, and, amongst others, Mr. Peuchet, a member of the Institute, for the information of the French government, that these regulations had been selected and taken from a similar charter granted to the English company trading to the east; a circumstance which will sufficiently illustrate the necessarily restricted nature of its commerce. Affairs continued in this state until the year 1769, when the French company was dissolved, and that trade thrown open. The island was ceded to the French crown, and had been, in the year 1764, resumed by an *arrêt* of the French government, which is mentioned in the history of the regulations of the Isle of France. It thus experienced a change, no doubt, in some respects, but there is no reason afforded to infer this settlement was, from that period of time, excluded from the general regulation, as applied to their other Indian possessions; but it appears to have

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always continued as a colony subject to peculiar restrictions in its trade. In the year 1787, we find it asserted, by some writers, that Port Louis, a particular port in that island, is made a free port. And it is mentioned in a work of Mr. Arnold, in 1791, that the Isle of France was then a free port to all European ships trading to the East Indies. In thus tracing the history of its connection with the mother country, it must be apparent, that nothing has been suppressed, either in the way of fact or authority, which can throw any light upon the * matter under investigation, however unfavor- [* 277] ably, even, some of these may be considered to bear upon the position contended for on behalf of the captors. What degree of credit such authorities deserve, will be a subject for the consideration of the court. These last-mentioned passages alone, seem to be the foundation of the contrary position, that the Isle of France has been, for a considerable time, a free port. Upon the authorities of this description, it would be indeed too much to concede, that a total change had taken place in the original constitution and frame of this settlement, especially as we may collect from a manifesto or declaration by the national convention of France, published not very many years since, evidently with reference to this, in common with other colonial establishments of France, that it was never in the contemplation of the French government to open the trade to these places to ships or subjects of other states. Every interference on the part of other nations in the trade between the colonies and possessions of France and the mother country, is interdicted under pain of confiscation of property, and the severest penalties and forfeitures. This famous French Navigation Act,¹ of the 21st of September,

¹ Law containing Navigation Act of the twenty-first of September, one thousand seven hundred and ninety-three.

The national convention, after having heard the report of the committee of public safety, decrees,

Article I. The treaties of navigation and commerce subsisting between France and the powers with which she is at peace, shall be executed according to their form and tenor, without any change being made therein by the present decree.

II. After the first of January one thousand seven hundred and ninety-four, no vessel shall be reputed French, nor have any right to the privileges of French vessels, if she has not been built in France, or in the colonies, or other possessions of France, or declared good prize taken from the enemy, or confiscated for contravention of the laws of the republic, if she does not entirely belong to Frenchmen, and if the officers and three fourths of the crew are not French.

III. No foreign commodities, productions, or merchandise, shall be imported into France from the colonies and possessions of France, unless direct by French vessels, or belonging to the inhabitants of the country, of the growth, produce, or manufacture, or of the usual ports of sale and first exportation, the officers and three fourths of the

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[*278] 1793, * was passed at the time when it was most natural to suppose that if any liberality of principle or of politics, in respect of other states, could have been avowed consistently

[*279] with the national interest, there were the * strongest reasons to induce such an avowal. But at this very moment, it is remarkable, the convention, speaking the sense of the country, interdict all trade to these places except in French bottoms, or those of the settlements themselves. Nothing can be a more satisfactory proof that this had long been the system upon which France had always acted with regard to her foreign relations, insomuch so, that even when her form of government was completely changed, and every thing else which had assumed the appearance of firmness and stability, had been overwhelmed by the spirit of revolutionary innovation ; the same jealousy of foreigners, and restrictive spirit of monopoly, distinguished the decrees of the new government. From comparing the state of this island with that of the West India islands, it must also be pronounced to be a colony ; and it is remarkable, that although those islands were opened to the Americans, they never ceased to be considered colonies in the strictest sense of the term.

foreign crews being of the country whereof the vessel wears the flag, the whole under pain of confiscation of the ships and cargo, and forfeiture of three thousand livres *in solidi*, and personal imprisonment on the part of the owners, consignees, and agents of the ships and cargo, captain and lieutenant.

IV. It shall not be competent to foreign vessels to transport from one French port to another French port any commodities, productions, or merchandise, of the growth, produce, or manufacture of France, or of the colonies or possessions of France, under the penalties contained in Article III.

V. The tariff of the national customs shall be redrawn and combined with the Navigation Act and the decree abolishing the customs between France and the colonies.

VI. The present decree shall be forthwith solemnly promulgated in all the commercial ports and towns of the republic, and notified by the minister for foreign affairs to the powers with which the French nation is at peace.

Folio 150, § 13.

Law containing provisions relative to the act of navigation. 27th Vendemaire, Year II.

The national convention, after having heard the report of its commissioners of the customs, decree as follows :—

Article I.—Manufactured Spanish or English wool, raw silk, gold or silver specie, cochineal, indigo, gold or silver jewels, whereof the materials are worth at least three times the price of the workmanship and appendages, are not comprehended in the prohibition of indirect importation, decreed by the act of navigation.

II.—In time of war French or neutral vessels may import indirectly from a neutral or enemy's port the produce or merchandise of an enemy's country, if there be no general or partial prohibition of the produce and merchandise of the enemy's country.

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BY THE COURT.

SIR W. SCOTT. That permission in favor of Americans was confined to a trade in certain articles, * and was subject [* 280] to several restrictions. To support the position you contend for, it would perhaps be necessary to show that the same restrictive regulations were still maintained at the Isle of France after the period when it is supposed its trade was opened to foreign vessels.

The conditions upon which this permission to trade to the East was granted to America by France would in themselves be a strong ground of objection with a British court of prize to receive any claim made on the part of Americans engaged in such a trade. These implied conditions are to be collected from the writings of American politicians. In the year 1793, a political work of some ability, entitled *Camillus*, was published in America, which in alluding to the trade carried on by Americans to the Isle of France and the east, observes, By the late treaty it must be acknowledged we obtained from Holland and France the opening of their East Indian trade, and this because from the critical state of affairs they found themselves unable to carry on that trade any longer. From the confession, therefore, of Americans themselves, it is clear this court cannot receive the claim of these parties with any degree of favor. The trade in which they have been engaged has been taken up when it was no longer practicable for the enemy to carry it on, and they have divested themselves of the neutral character by endeavoring to facilitate the trade of the enemy. A temporary concession or permission to trade with these ports during a period of war cannot for a moment be supposed to have the effect of divesting them of their colonial character. It is fair to conclude, that as they were indebted to the existence of war for this * permissive trade, so at its [* 281] conclusion they would also be deprived of it altogether, and the trade would become as restricted as ever. In the additional appendix of *The Liberty*, one of the cases on this list, is to be found a comment upon the French Navigation Act, extracted from the writings of Mr Peuchet, who has before been mentioned as speaking with authority upon this subject, which strongly marks the disposition of the French government to be most decidedly averse to change the ancient system restricting the trade of neutrals to the colonies or dependencies of France.¹ In speaking * also of the [* 282]

¹ Extract from the papers of *The Liberty*.

We think ourselves obliged to remind the owners of ships of the regulations of the

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probable existence of a new India company, he considers at some length whether it would be expedient or politic to establish [* 283] a free port in the Isle of * France. When a person of his description is discovered speaking of the policy of a proba-

act of navigation now in force, and which is of the greatest importance for them to be acquainted with, in order to prevent any kind of error in the equipment, or on the arrival of their ships in the ports of the republic.

This is not the place to examine to what extent an act of navigation may be useful to the commerce of France, nor if that which the convention decreed in September, 1793, contains every desirable condition; our object is only to make known the principal articles, those with which it is most important for the owners of ships and merchants to be acquainted.

The act of navigation, passed on the 21st of September, 1793, like all laws of the same kind, has two objects in view, 1st, To prevent the importation of foreign goods and merchandises in ships of a country of which these goods are not the growth. 2d, To prevent all foreign shipping from carrying goods from one part of the republic to another.

The first of these regulations is contained in the third article of the act of navigation. It prohibits the importation into France, or into any of its possessions, of foreign productions, or merchandise, except in French ships or in ships belonging to the inhabitants of the country where the said provisions, productions, or merchandise, shall grow or have been manufactured, or from the ordinary port of sale and first exportation, and the officers and three fourths of the mariners shall be of the nation whose flag-ship shall bear, on penalty of confiscation of ship and cargo, and of 3,000 francs additional, a penalty on the proprietors, consignees, agents, captains, and lieutenants of such ships.

From this prohibition are excepted wool unwrought, from Spain or England, raw silk, cochineal, gold and silver, toys of gold and silver, the metal of which is worth at least three times the workmanship. Law of the 19th of October, 1794.

The same law likewise excepts all which shall be brought in a foreign ship on account of government, from whatever place the productions and merchandise laden on board the ship shall come.

It also excepts, during the time of war only, goods and merchandise which shall come even from an enemy's country, when the same shall not be prohibited.

They can, therefore, no longer be imported into France but in French or English ships, and, of the latter, the officers and three fourths of the mariners must be English.

The fourth article of the act of navigation, of the 21st September, 1793, prohibits foreign ships from carrying from one part of France to another any goods, under the same penalties pronounced against indirect importations.

The prohibition is not to extend to vessels freighted on account of the republic.

It has also been suspended during the late war in favor of all neutrals.

The second article of the committees of public safety, of commerce, and of marine, of the 25th January, in the year 1795, enacts,

That it shall be permitted to all French merchants to employ, during the present war, neutral ships to transport from one part of the republic to another, the goods and merchandise of France.

These permissions were granted indifferently either by the minister of the marine or

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ble measure, it is not too much to infer that no such measure had been at that time adopted by his government. Mr. Peuchet wrote in the year 1802, and held out these things to all the maritime world navigating those seas. Although this act, like many other revolutionary decrees, was overruled after it had been discovered to be productive of great inconvenience; yet there appeared no disposition to render the trade to France and its dependencies any further open to other nations than merely so far as it was absolutely necessary for their convenience, or perhaps for the very existence of the latter. The distinction, therefore, attempted to be drawn between the Isle of France and other French possessions abroad, is without foundation. It cannot be considered a free port, but must be taken as comprised within the scope of the Navigation Act, which makes it illegal for neutrals to carry to the colonies any other produce than that of France, or to convey thence any other than colonial produce. Upon the established principle of national law, which will not permit a neutral to enjoy a trade for the advantage ^{*} of the [* 284] enemy, and which through the distress of that enemy alone they are permitted to exercise; your lordships even upon this part of the case cannot but consider the judgment of the court below sustainable upon the soundest principles.

The next part of the case refers to the *portus a quo*, in examining which it will be necessary to inspect with some minuteness the history of the settlement of Batavia, from which port this homeward voyage commenced. This settlement in the island of Java was established by the Dutch so early as the year 1619, and shortly after was converted into a source of immense wealth and national aggrandisement. A charter was granted by the government of Holland in the year 1602, to merchants trading to the east, under the title of the Dutch East India Company. This charter was subsequently renewed at the expiration of twenty years, when the trade thither was found so valuable, and more especially to this and the other Indian

of the interior, they were transmitted to the administration of the customs, who gave notice thereof to their officers; the latter were not to pay any attention to such regulation unless it came to them through that channel.

The neutral ships, thus authorized to become coasters, paid only the duties imposed on French ships.

This permission to employ neutral vessels in coasting, having been granted only to protect our commerce from capture, it now becomes useless, it, therefore, has ceased with the war.

This remark is important, to prevent those contests which might arise between the owners, freighters, and masters of foreign ships, and the officers of the customs, and we have inserted them as essential to be known for the tranquility of commerce.

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islands, that different renewals were granted as soon as the old terms had severally expired. The terms of these charters were extremely absolute and exclusive, prohibiting and proscribing any trade by other nations to these settlements under the most severe penalties and forfeitures. This exclusive system continued to be enforced with peculiar and unabating rigor for a whole century, during which the trade in spices and other articles was carried on with unparalleled success and emolument. To maintain this monopoly the Dutch were compelled to have recourse to such arbitrary measures and sanguinary conflicts, that the company is said to have written its history in characters of blood. From this period it appears to have

been peculiarly the wish, as it undoubtedly was the height [*285] * of policy to maintain themselves in the exclusive enjoyment of this trade.

And so early as the year 1619 we find, in a treaty concluded on the 7th of July between England and Holland, the two East India Companies of England and Holland mutually agree to consider any trade, except that by the companies, carried on to their possessions, as an highly censurable and criminal interference in a trade denominated exclusively their own. It was extremely natural these companies should wish to monopolize this trade, which was now discovered to be most lucrative, and should, therefore, make every effort to obtain a sanction for this monopoly from their respective governments. They did so and succeeded; but not content with this, by the treaty alluded to, they strengthened this sanction in their own favor as against all the world beside. This has been part of the policy of all nations having settlements and colonies abroad. By the fifth article of the treaty of Munster, we find it was agreed on the part of Spain and the states of Holland, that neither should interfere with the other in their respective trades to the East and West Indies. In the treaty between Holland and the United States of America, shortly after the declaration of their independence, it was expressly stipulated then that no American subjects should interfere in the commercial intercourse of Holland with her settlements. No hostility was then in contemplation, and as there were no reasons to avow any liberality of policy, the system of exclusion and monopoly, in the strictest sense, was distinctly avowed. The same appears to have actuated in a peculiar degree the French government in passing the Navigation Act.

That this exclusive system was acted upon by the Dutch is to be collected from yet later authorities. In the *Bibliotheque Commerciale*, Mr. Peuchet, speaking of * the settlements in the Molucca islands and Java, observes, the trade thither is subjected to rigorous restrictions by the Dutch government, which

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will not permit any interference in it by Europeans. This opinion is confirmed by referring to the judgment of the High Court of Admiralty delivered in the case of *The Rendsborg*,¹ where a contract had been entered into by the Dutch East India Company to provide a Danish mercantile house with the valuable produce of the settlement of Batavia on very advantageous terms, and at reduced prices, in which it appeared to be the object of the company to clothe the neutral merchants with all the facilities and powers of the company itself to enable him to transport a great proportion of the produce of the colony to Europe under the sanction of its neutral character, and thus benefit the colony by relieving it from an accumulation of commodities which it was found impossible the company could otherwise dispose of to advantage. The judge of the High Court of Admiralty, in prefacing his judgment on that case, observes, "Into the ordinary state of the trade at the settlement of Batavia, which has been occasionally disputed in this court, I have made particular inquiries, and I have satisfied myself by resort to what I consider as means of authentic information. In the accounts given in books it is represented that Europeans are not usually admitted as merchants except Spaniards, who have commodities to barter, and have obtained particular privileges. With respect to other nations, *Abbe Raynal*, on whose account, not confirmed by other testimony, I should not, perhaps, venture absolutely to rely, says, 'that English vessels are seen there more frequently than those of other countries; they touch there in their voyage from Europe to China, under the pretence of obtaining water, but the trade *carried on by them [*287] is a secret and clandestine trade.' These accounts, confirmed from other quarters, satisfy me that the trade of that settlement is permitted to foreign nations with a very limited indulgence indeed." These observations will be found extremely applicable to the case of some vessels belonging to other countries, mentioned in the papers of this cause, but which the Court of Seventeen regret should have been permitted to carry on an illicit trade upon the coast of Java, with a remonstrance on the part of the company, complaining of the want of fidelity in those to whom the management of their concerns in that island had been committed, by permitting this traffic to be connived at, to the manifest injury of the company, and even threatening its total dissolution.² But were it even proved that a partial permission had been given, or rather connived at by the company, to a particular nation in amity, it can never be supposed to

¹ 4 Rob. Rep. 132.

² See Appendix.

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extend the length of establishing any right to trade with these restricted possessions. It is from the express acts of the Dutch government that its intention must be known and collected. To support a case for the appellants here, it cannot be maintained that the Americans lay any claim to a permissive trade during peace. They cannot, then, have any during war, if it is not secured to them by Holland during peace as a matter of right, an American owner cannot avail himself of it against a British cruiser in time of war between Great Britain and Holland. Several communications took place between the Court of Seventeen, the Dutch governor-general in India, and the minister plenipotentiary of Holland, residing in the American states, relative to the increasing trade of the Americans

on the coast, which are extremely explicit in avowing the [*288] *dissatisfaction felt by the company, and the apprehensions entertained lest this illegal trade may terminate in the extinction of the company. A secret letter of the Dutch Court of Directors to the supreme government of Batavia on this subject requires "that they avoid facilitating the navigation of such American vessels to India and their trade there, charging them that they suggest, by their first opportunity, what the necessary means are which may be adopted to discourage them from such navigation." By all these documents it is pretty satisfactorily proved, that no exception in favor of neutral vessels was ever in contemplation of the company; but on the contrary, all foreigners were excluded from legally trading with these settlements, and those who persevered in the trade were considered as smugglers, up to the very period of the war. On the commencement of the war all things were disorganized and changed from their original state, insomuch so, that the Court of Admiralty appeared indisposed to interfere with the question at present under discussion. There has been invoked into the case of The Liberty, from the papers of The Rapid, (a cause decided in the High Court of Admiralty,) a secret and confidential paper from Mr. Van Polanen, an agent of the Dutch government of India, to the minister of marine and colonies, residing at Amsterdam, inclosing a copy of a despatch transmitted by him, to the governor-general of Dutch India. By this representation, which is very voluminous, it appears the object of the Batavian government in sending out Mr. Polanen, who seems to have been armed with very comprehensive and unusual powers, was to enter into a negotiation with merchants residing in America, to engage

them in a trade with the Dutch settlements in India, particularly in *Java and the Moluccas. The writer, who appears to be perfectly qualified by his information and acuteness for such a mission, recites the motives which had induced

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the company to engage the Americans in this trade, which originated in the capture and burning of the major part of the shipping belonging to the inhabitants of Java; the weak state of its defensive force, the augmentation of the difficulties and risks with which the Eastern factories have hitherto been supplied with money and stores by the Batavian government; these and other increasing obstacles had induced the governor to believe the only means of averting the danger to which the factories would be exposed, consisted in laying open the trade with those factories, but only so far as it had become necessary to the annual supply of those factories with specie and stores, which could only be effected by contract in America. To effect this desirable object the writer observes, it would be necessary to hold out strong inducements to merchants to purchase the overstocked commodities of those factories; he, therefore, proposes that the price of coffee at Java, and cloves, nutmegs, and mace, at Amboyna, should be reduced considerably. Speaking of the prospect there was of the Americans entering into the trade, he observes, "a considerable difference must take place in effecting insurances to Batavia and Amboyna, which arose chiefly because the English may, in some measure, regard the navigation from hence to Batavia as a customary voyage in time of peace, at least, so they maintain here." This latter part seems to contain a sneer at the ignorance and credulity of Great Britain and America upon this topic, and leads us to infer that he and the governor-general, with whom he communicates, knew much better, and that the ^{*}fact was not so. He [*290] adds, "but the navigation to the Moluccas is so universally known never to have been permitted by the Dutch government that one must expect that an American vessel intercepted in that trade by an English privateer, would be liable to confiscation. On this principle it is also, that the insurance from hence to Sourabaye¹ is higher than to Batavia, though not in the proportion of that from hence to Amboyna." After stating that he had concluded a contract upon these principles and stipulations, he assures the governor-general there are good reasons to believe the expedition will be attended with great benefit to the Dutch factories and establishments in the East, that the American vessels were of a peculiar construction, fitted to elude and outsail any British cruisers in those seas, some of which were well armed and amply provided with means of defence. This letter would, in the absence of all other information, be decisive of the general policy of those establishments, and

¹ One of the ports to which this expedition was expected to be destined.

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so perfectly aware was the owner of The Patapsco of the close and jealous spirit of the Dutch government there, that by his letter of instructions to the master he appears to have even entertained doubts whether the master would be permitted to land any goods or receive a cargo in return, providing for this emergency by pointing out to him the Isle of France in the last resort. In this letter he refers darkly to some nameless services, whereby a vessel engaged in trading there had been preserved to its owners, but which it

[* 291] * is probable, from the manner in which mention is made of the circumstance, that it was a service which, however it might appear praiseworthy to the Dutch government,

must be looked upon, from that very circumstance, as unfavorable to his claim in this court. The passage runs thus:—"In case there is any difficulty in permitting you to trade and to get a return cargo, you must petition, stating that your owner was one of the owners of the ships Samuel Smith and Rebecca, and that by the integrity of the owners of the same Samuel Smith her cargo was preserved to its owners; that I, as owner of the ships Smallwood, Hebe, and Ann, have constantly been sending large sums to Batavia in dollars. In the unfortunate event of a total refusal of your trading at Batavia, I know nothing you have left but to go to the Isle of France; but this you must avoid; it would be next to a total loss." Here the master is detected avowing his unneutral-like conduct as a motive for the condescension of the Dutch government, and also his conviction of the doubtful and unauthorized nature of the trade in which he had engaged. The letter of Mr. Polanen discovers the sole reason which can be given for the novel policy of the Dutch government, in making these special concessions under agreement to a particular set of men; namely, the dangers to which these colonies were exposed, from the activity and vigilance of the belligerent. The American merchant is thus discovered interposing in the war, and availing himself of the neutral character to transact the disgraceful drudgery of a monopolizing company; whilst, on the other hand, he takes advantage of special concessions from the company to exempt him from the consequences attendant on interfering in an interdicted trade. Thus the national honor and character

[* 292] is forgotten, or rather converted into an engine * of hostility. The court cannot permit this trade to pass without its deserved censure and punishment, when the most deliberate fraud, artifice, and connivance have been employed, in order to draw merchants to trade with these settlements, not in the genuine character of neutrals, as to a free, open traffic, but to do hostile and illegal acts, in violation of all public faith, for the sake of obtaining the trade

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itself, and to convert their diligence to the support of a colony of the enemy.

The Attorney-General. Two questions arise upon the present case, as to the legality of the trade in which this vessel was engaged: the first, could she have prosecuted this trade during a period of peace, from the Isle of France? and, secondly, could she, during a peace, have taken this cargo from Batavia? To both the questions there must be given a direct negative. The trade, in the first instance, is contrary to the express law of France respecting its colonies; in the second, it is contrary to the laws of Holland with respect to Batavia. Viewing the case as if this vessel had cleared out for the Isle of France, and had set sail thither, this avowal of her true destination would not have legalized the voyage. The colonial laws of the various nations having colonies abroad were, doubtless, intended to regulate all commercial intercourse with their foreign possessions. There is no distinction between sailing to the colonies of those countries, whether situated in the East or West Indies. The reasons which induce any nation to interdict any trade to the colonies in the west, by foreign ships, must be equally applicable to the case of their colonies in the east. In point of fact, no such distinction has ever existed with respect * to [* 293] the settlements in India; but from various causes it has happened that a more peculiarly jealous policy has marked European nations, with respect to their possessions in the east, than anywhere else. The principle upon which this court must here decide has been distinctly laid down, repeatedly recognized, and is equally applicable to the case of a trade with the Isle of France or with Batavia. The laws of war will not permit the enemy to have recourse to any relaxation or modification of previously existing regulations, so as to avail himself of a neutral trade in those articles not permitted neutrals to traffic in during a period of peace, when no apprehensions of capture were entertained. The case of this vessel, so far as respects the Isle of France, is comprised within the third article of the French Navigation Act; and there cannot arise a doubt that, upon that article, any vessel carrying on a similar trade to that island during peace would be condemned by a French tribunal.

BY THE COURT.

According to that article a Dutch ship, freighted with these commodities, might have entered the Isle of France without incurring any danger; as these articles are the growth of the Dutch colony,

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from whence they might immediately be imported into the French colony.

Ever since that decree the war has continued, with the exception of a few months during the short peace. If it were even satisfactorily established that the French government had relaxed its decrees during that peace, it would be necessary, in order to derive here any benefit from such relaxation, that the claimants should show it did not originate with a view to a future war at a period not [* 294] very distant. From the * artful silence of Mr. Polanen, in his negotiation with the American merchants, it is evident the same strictness prevailed in the ordinary trade of Batavia. Had not this strictness in fact existed, he who seems so anxious to drive a bargain for his government would have said at once, by way of inducement, — “The island of Java, at least, is open; you need not be apprehensive of trading thither; it is a customary trade for neutrals.” This he avoids, and avails himself of the general misunderstanding on that head, and leaves them to extricate themselves from any unpleasant consequences which might arise from their ignorance. The great object was the relief of the colonies, which being effected, he was perfectly at ease as to the fate of those who had been instrumental in its accomplishment.

Adams, for the claim. No question arising as to the property in the ship and cargo, there can be no pretext for requiring further proof in this case. The proof, also, of a legal intention in the master in entering the Isle of France is detailed most satisfactorily in the papers and correspondence produced in the cause. The letter of instructions proves a *bond fide* intention, on the part of the owner, that the vessel should return direct, with a cargo adapted to Baltimore. The master having delayed some time, and made every possible endeavor to obtain the merchandise required, informs his owner they cannot be procured; adding, — “I am now taking in arrack and clayed sugars; this is like doing nothing, because it would not take more than one third of my funds; but what better can I do? I cannot think of waiting four or five months; as the company’s last

answer was to me, — If I could wait that length of time, [* 295] * they could not promise me a cargo of sugar and coffee.”

“At the Isle of France no coffee is to be had; so that I don’t think I shall stop there without I am short handed, and I am not certain but that will be the case, as I have two or three sick men at present; one in the hospital, I expect to lose, and am not very well myself.” Here the intention of calling at the Isle of France,

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and even of stopping, under particular circumstances, for some time, is unequivocally avowed. In his next letter, fifteen days after, he says:—"I shall get under weigh to-morrow, bound for Baltimore; but in my present situation expect to stop at the Isle of France to recruit, several being sick on board. Should we not stop at the Isle, I shall stop at St. Helena, for water and refreshments. Your orders were, if I could not do any thing here to go to the Isle of France; but I learn coffee there is from twenty to twenty-two dollars, and very little to be had at that." Throughout his stay at Batavia, there appears much fluctuation in the mind of the master whether he should refresh in one place or the other. It was not extraordinary, for the event altogether depended upon a contingency. The circumstance of the destination in the log being originally described as for the Isle of France, must be imputed to a mere mistake of the writer; for when afterwards it comes into the proper hands the error is corrected, by simply drawing the pen through the words Isle of France, and subscribing Baltimore. This was indeed unwise, if a fraud was intended; for such an awkward mode of executing it could not fail to draw the attention of a British cruiser, and stamp the conduct of the master with a suspicion that he had very cogent reasons for the alteration made. Erasure would have removed the difficulty and risk; but integrity *of intention naturally inspires [* 296] confidence. Fraud and candor are seldom features of the same enterprise. The means to which an artful man would have instantly resorted, to conceal his fraudulent design, are here deemed unnecessary to give a color to this transaction, and the alteration is not attempted to be concealed. In referring to the cases adduced to illustrate the argument for the captors, it is worthy of observation that, in the cases of The Penman and The Amsterdam Packet, a reference was distinctly made to a fraud detected in the arrangement for the outward voyage, which, it was contended in argument, should affect the homeward voyage. This question and the present are perfectly distinct, and bear no analogy to each other. Whilst we avow explicitly the nature of this voyage and the intention to enter this island, the possible imputation of fraud is rebutted. If, then, it should appear ultimately to this court that there existed no illegality in the trade directly to and from these islands, how can the interests of this owner by possibility be affected? The letter of instructions to the master is perfectly like that of an owner, cautious, yet adapted to circumstances. The departure from these instructions is naturally accounted for by the subsequent information received by the master upon the subject; coffee was not to be procured at Batavia at all, nor at the Isle, except at an enormous price. A cargo must be procured.

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Sugar, arrack, and canes, are not improper articles for an American market. Little, indeed, has been made of the asserted concealment of the real character of the passenger, Mr. Lepontouin. The sickly state of the crew rendered his passage in that vessel peculiarly eligible. He was desirous to work his passage, and without [*297] ascertaining with precision *where he might be landed in the course of the voyage, the master felt it to his advantage to embrace his offer. The facts, then, of this case are all fair.

As to the question of national character, it is without doubt a popular topic, and much has been urged upon it. It has been assumed as the great basis of the argument, that these possessions are to be considered colonies. This is not the fact, and, therefore, it is unfair to reason upon it. There certainly is no charm in the term itself. Colonization merely signifies a remotion of part of a nation's population to a distant settlement. This description does not apply, strictly speaking, to the possessions of Europeans in either the east or west, but more particularly to those in the East Indies. The sole question for your lordships' attention is this: Does the trade appear to be an interdicted trade? Have there hitherto been adopted positive and express regulations on the part of these respective governments in Europe, amounting to a total prohibition of any trade to or from these possessions except in bottoms of the mother country, or of the colony itself? Such is nearly the case in the colonies in the West Indies; but no such regulations of government have ever been adopted in the east. The privileges of the English East India Company amount merely to a monopoly in its favor against our own subjects. This is the foundation of the policy of eastern monopoly in all cases. No inference drawn from the state of foreign commerce in islands in the West Indies can be at all applicable to that in the settlements of these European nations in the east. The situation of the one is directly the reverse of that of the other. The trade of all these settlements in the east, of whatever European nation, is shut up in particular companies to the exclusion [*298] of *any others of their fellow subjects, and which must, therefore, derive their rights from municipal regulations alone.

Whilst America has remonstrated with this country upon other interdictions in its general trade, we have said, is not the trade to the East Indies and Batavia open to you? It has been almost avowed by authorized persons on different occasions. In the correspondence between Mr. Smith and Mr. Jackson this is recognized. The American government has lately published the conference of Mr. Pinckney with Canning, in which it is asserted that the question of Bata-

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via had been given up. This it is very probable may be the case. The Batavian government might have found out the American trade thither to have been considerable, even during the period when their jealousy was most alive, and therefore, they gave it up. In that case it would seem the courts of prize in this country are now required to act in one way, while the government itself will be acting in the reverse. The lateness of this correspondence leaves us in doubt how far it may be proper to argue upon those topics, which are probably, ere this, happily discussed and finally arranged. Taking into consideration the distressed state of America, restricted as she is by turns from almost all the ports of Europe, it is to be hoped that upon the proofs now adduced, and even if the question only appeared dubious, your lordships would be induced to consider that we had sufficiently succeeded in establishing our case. To maintain that if America had even traded with the settlement in Java during the short peace, it would in no wise sanction their present trade thither, is a position extremely objectionable. Enough has ^{*}already fall- [* 299] en from the most competent authorities to discountenance the principle attempted to be laid down, that a peace is not to be taken as a peace with all its natural consequences. The shortness of the peace cannot deprive it of its essential attributes; particularly when it is recollect that unfortunately Holland during her adherence to and alliance with this country, sunk from that rank and power to which her commerce and industry had raised her amongst the nations of Europe. Her fleets and armies were no longer at her own disposal. America, therefore, viewing her helpless situation, was induced more extensively than ever to enter into this trade from the prospect of its permanence. In the case of *The Minerva*, Andauille,¹ in which it was argued that a neutral ship trading from the colony of the enemy to the mother country, Spain, was liable to confiscation; the court below restored the vessel, although the destination was ascertained to be direct from the colony to the parent state. This permissive trade, however, was not confined to Americans. Other foreigners had partaken in it, and we have had an opportunity of knowing that Danish merchants have been permitted to trade thither during peace, although it appears the first printed reason for condemnation assigned in this case is, "because the trade of the colony of an enemy not permitted in time of peace, and not within the provisions of the order of the 23d June, 1803, was illegal." Now this first misstates the fact, and next proceeds upon the assumption that

¹ 3 Rob. Rep. 229.

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the places referred to are actually colonies, and begs the whole question. This order cannot possibly have a reference to the condemnation of vessels in any trade except a trade by neutral vessels from the colonies of the enemy to the mother country, the exception being made in [*300] favor of neutral vessels * carrying on trade directly between such colonies and the neutral country to which these vessels belong, and laden with the property of such neutral country. This order, it must be obvious, referred to close colonial ports. The Isle of France has never been considered an interdicted port, but in common with some others has been designated as a port of call and refreshment. Such are the Cape of Good Hope, St. Helena, and others. It has been alleged that upon the Navigation Act this trade was illegal. Admitting this as a principle, it becomes necessarily a part of their case that she was unlading in the island, or was going thither for that purpose ; but the vessel never arrived there, and the intention is most expressly disavowed. Her object was to obtain refreshments. Her crew was in so sickly a state that she was unable to double the Cape. No other port was open or within their reach. The very issuing of the Navigation Act by a rash and impolitic government on the eve of a war, a time when every other nation would have been disposed to retract, notwithstanding proves the trade there was open at least previous to its enactment; namely, in the peace preceding. It is, therefore, perfectly unnecessary to consider or reply to the observations made respecting the probable establishment of a free port in that settlement. This Navigation Act being of a municipal nature, bears but a faint resemblance to the jealous political guard which has been imposed by all nations upon their West India colonies, and which has interwoven itself into all the treaties of modern date. The learned judge of the court below, in giving his judgment in the case of *The Immanuel*, observed, that notwithstanding the general exclusion of other nations from the colonies,¹ the Americans were [*301] particularly favored, and even during periods * of peace had been permitted to exercise a limited trade with the colonies. The relaxation in their favor seems to have been very general, and this instance considerably strengthens the presumption, that as the closer colonial establishments were open to America, these particular establishments were never intended by their respective governments to be closed against them.

The secret letters of the Dutch Company and their agents have been confidently insisted on as proofs of the disposition of the govern-

¹ 2 Rob. Rep. 201.

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ment with respect to these Dutch settlements. What reference can they possibly have to that which it is necessary the respondents should establish in support of their case? These are not official notifications of the intention of the government, but are merely the complaints of a commercial body, upon finding the Java ships had been supplanted in this lucrative trade. Nothing can be inferred from it in the way of general law. These remonstrances admit that Danish China ships had also partaken of this trade to a great extent in time of peace. But the interference in the coffee and spice trade is that of which alone the company complain. With respect to the articles of sugar, arrack, &c., which constituted this cargo, no monopoly even is alleged. The question of illegality in exporting this cargo is not raised even upon the evidence adduced for the captors. The objection which has been raised upon the basis of the revenue law of that island is one perfectly nugatory. This court cannot be called on to support and enforce the revenue law of another nation by the confiscation of neutral property, were it admitted that the trade in which that property had been engaged was subject to the penalty of confiscation by the revenue law; but this fact is not substantiated; indeed, the notorious infringement of the principle by all other foreigners resorting thither * seems to dis- [* 302] prove the position. To establish the captor's case it is necessary to show foreign merchants had made no footing in this trade in peace, but this letter of 1789 shows they had obtained it to an alarming extent. The letter of the company in 1790¹ admits the trade is so frequent that they apprehend thence serious injury, and recommends the government of Batavia to avoid facilitating their trade. Strange proof of the existence of prohibitory national law, indeed! Why not proceed at once to seizure and confiscation? This is at once a tacit admission that the trade was not even prevented by the revenue laws of the settlement. What would have been the tenor of instructions from this country to the government of our colonies if it were represented that the Americans carried on a trade there in violation of our revenue law? Certainly a severe reprimand for the neglect of government, and an order to seize and condemn all vessels engaged therein. Another letter,² dated 1791, speaks of an intention of future prohibitory enactments. Of any existing law and practice conformable thereto these communications are perfectly silent. Another,³ written in 1791, expresses such doubt in the mind of the company as to the propriety of the governor's con-

¹ See Appendix.² Ib.³ Ib.

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duct in having permitted an importation, that nothing can be thence inferred unfavorable to the position upon which we rest our case. It is material also to observe, that these permissions occurred during periods of peace, when it is urged that foreigners were always interdicted and positively excluded. The only objections made originate in the commercial monopolising views of a jealous company. How should our government, if thus called upon, treat an application or remonstrance on a subject of this nature?

[*303] However prejudicial the infringement might *appear to the company, government would consider it a mere matter of profit and loss between the individuals concerned. Nothing appears throughout this part of the evidence in confirmation of the existence of any prohibitory law, but much is disclosed to disprove it. Upon the subject of Mr. Polanen's letter, it is rather extraordinary that a despatch, treating of things as they actually were at the moment of communication, and written in August, 1809, should be adduced as evidence to affect a vessel captured in 1805. This refers merely to the present trade of Batavia during a war, contains no proof of the fact of exclusion, but shows that it was the anxious wish of the company not only to throw open the trade, but even to make considerable sacrifices of emolument in order to induce Americans to enter into it more largely. Java coffee being an article of more ready sale than spices, the object to which this agent directed his attention was the assimilating the profits upon a cargo of spices to that on one of coffee, so as to extend the trade in spices, and thus, by the medium of Americans, dispose of produce accumulated by reason of the embarrassment of their own trade. An invitation is here certainly held out, but solely that of increase of profits. Such a trade would no doubt increase during war, yet vessels engaged in it would not be considered, in a court of prize, liable to confiscation *ex consequentia*. A distinction, it has been said, is made by him with a sneer, between the trade of the Moluccas and that of Java, and it is contended he knew better. His observations bear no such interpretation. This, alone, was the great object of his inquiry, "What is the proposition maintained with respect to this trade amongst the Americans?" He asserts they entertained the idea that the English

[*304] lish considered the one a customary *trade, the other not.

He had nothing further to investigate, but represents himself satisfied it would induce the persons with whom he was contracting, to enter into his views upon more advantageous terms to the company. By the treaty of Munster, it was certainly stipulated that Spain and Holland should not interfere with their respective trades to their different settlements in India; but this originated in a wish

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to complete their separation, so as to enable each to exercise an entire and undisputed sovereignty in their respective dominions. The treaty of 1782 stipulated for a general reservation of rights, so that if America had any rights, they were reserved to her by the terms of this treaty. The terms are general; it would, therefore, be necessary an express stipulation should be made to interdict the trade by Americans to Batavia. Nothing less would have been effectual, since no fundamental principle existed to debar her trading thither. This opinion had its due influence upon the mind of the court in the case of the *Two Marias*, Bourne,¹ decided 2d of May, 1809, which sailed from Batavia by the Isle of France to America. The voyage was contended to be from Batavia to Holland through these intermediate ports. There was, besides, a spoliation of the papers on board, which the master accounted for by stating the inconvenience of conveying private letters. Further proof was admitted as to the part of her cargo consisting of Java coffee, and the remaining goods, taken on board in America, were restored. Giving the captors the utmost that can fairly be made of Polanen's letter, we contend they have not taken that burden of proof upon them which is necessary for condemnation. Nor in a question of such extreme importance to the interests of America, more particularly in the present state of European traffic, it would be imprudent, *in the extreme, to impute, on [*305] the grounds at present offered to the court, the possibility of condemnation.

Stephen, same side, arguing in support of the principles just laid down, considered it a violation of common sense to describe Java, an island of seven hundred miles in length, as a colony. Hindostan might as well be similarly denominated. These places had always been described by Dutch writers as factories. Colonies, thus denominated from the term *colonus*, were peopled from the mother country with agricultural views. Such were the West Indian farms, cultivated by laborers procured from Europe and Africa. The proprietary interest of such land resided in the mother country. It was a mere transmarine farm, depending solely on the mother country for its supply by importation or trade by exportation.² If a West Indian colony surrender, it becomes, with the property there, altogether prize to the captors. Would this be the case if Java were conquered? Gibraltar might equally as well be considered a colony of England. After dreadful conflicts, it was conceded, by the treaties of Munster

¹ Lords.

² Immanuel, 2 Robinson's Reports, 198.

The Patapco. 1 Acton.

and others, that particular nations should not trade to these and certain other settlements abroad. But none ever heard of a war to prevent a trading by other nations to Jamaica. The strict and absolute nature of a colony would be sufficient in itself to prevent any such trade. A law might as well be passed, prohibiting a trade from London to Bristol by foreign ships. Supposing the non-supply of Java would make it surrender to the forces of Great Britain, it would be difficult to admit that Great Britain, in consequence of the regulations previously adopted by the Dutch company, as it had been urged,

could avail itself of them so as to prohibit the Americans [*306] trading thither. If the Dutch *company lost their ascendancy, doubtless even this restriction would be taken off altogether. There had not appeared in the conduct of the court any anxiety to reserve this question of national character. This trade had been carried on by America for a long time without any interruption; its legality might have frequently become a subject of discussion in this and other courts. Thus, in the case of *The Indus*,¹ a vessel engaged in a similar trade, although instructions had been given to the master to alter his manifest, on further proof the court decreed restoration. Shortly after, another case occurred from Matanzas, in the Havana, and similar instructions had been given, which was followed by condemnation. The cases were, in some respects, similar, but the court proceeded upon those principles only which were applicable to the different settlements to which the parties traded. The general practice of this court had been considered by all merchants as a standard of security in commercial speculations. How dangerous and unjust, then, would it prove, to pronounce an accustomed neutral trade illegal without any previous notice. In *The Calypso*, one of these cases, there were four very strong affidavits to prove the appearers never heard of any restriction of the trade to the Isle of France. The French Navigation Act undoubtedly proved an additional restraint on foreign trade, but stopped far short of our monopoly in reference to the colonies. No part of the East was laid under similar restrictions as the settlements in the West Indies. In *The Erin*, one of these cases, the judge of the court of Bombay appeared to be satisfied this trade was open. Whenever vessels have been seized sailing from the Isle of France to British or neutral ports, it had been generally for defect of papers or suspicion of fraud. The grounds of decision in **The Penman* and *The Amsterdam Packet*, was that of fraud. If even this

¹ Lords.

The Patapsco. 1 Acton.

vessel had entered the Isle of France, and disposed of her cargo there, it would not subject her to condemnation, the trade thither being permitted. To land a passenger there would not have been illegal; but neither he, or the vessel, ever reached it, the distress and sickness of the crew leading the master to avow an intention which occasioned this detention. If, however, the court should not be disposed to restore this property, he hoped there was abundant inducement to dispose the court to admit the claimant to the benefit of further proof.

The *King's Advocate*, in reply, did not understand the objection raised, that these restrictions, if in force, arose from mere municipal regulations, which, therefore, the court could not be called upon to enforce. Were they not all founded upon the same general policy of commercial interests in ships, sailors, foreign commerce, and the great national advantages resulting from them? In what was the foundation of these restrictions defective? By the first charter of the East India Company it was particularly provided, that stranger foreigners should be compelled to obtain special licenses in order to enable them to trade in these establishments. These restrictive regulations were enforced with peculiar strictness. The Navigation Act showed the disposition of France to be equally averse to the interference of other nations in their trade to the east as in that to the west. The late decisions in our courts of law,¹ had recognized this mutual monopoly, as long established by various treaties. The interval of the peace was too short to ascertain what was intended to be the permanent policy of the French or Dutch governments in their relations with India, as had *been already laid down by the court [*308] with respect to the enemy's settlements in the West Indies. The proof imposed on the respondents was extremely difficult. They had to seek in foreign countries for principles of foreign law applicable to this case. The obstructions thrown in their way were not merely accidental. At least, suspicion should arise from the circumstance of the master's unwarrantable departure from his instructions. The party should, therefore, be so far concluded by it as to be required to introduce further and satisfactory proof, if the court should be of opinion the case of the respondents did not entitle them to the affirmation of the sentence pronounced by the court below.

JUDGMENT.—July 25th.

SIR WILLIAM GRANT. Having had the general question on the

¹ *Bird v. Appleton*, 3 T. R. 562.

The Catharina Elizabeth. 1 Acton.

Batavian cases long under consideration, and given to it that attention which so important an investigation demands, we have been induced to conclude the evidence now offered to the court is too imperfect to found any opinion one way or other upon the general nature of the trade in which these vessels were occupied. That being the case, and the captor having failed in substantiating the position upon which he principally founds his right to make prize of the vessels in question; namely, the illegality of this trade, we are of opinion the consequence is, that the several sentences of condemnation from which the claimants have appealed must be reversed, the circumstances of each particular case being insufficient to support upon other grounds the sentence of the court below; whilst the sentence of restoration in that case, from which the captor has appealed, must be affirmed. In all these cases, however, we decree the payment of the captor's expenses in this court and that below.

[* 309] * SENTENCE.

The court decreed the proofs exhibited by the captors in this cause did not sufficiently establish the illegality of the trade in which this ship was engaged, and pronounced for the appeal and against the sentence of the court below, and restored the ship and cargo, on payment of the captor's expenses in both courts.

The sentences of condemnation pronounced on The Liberty, The Prudent, and Calypso, were also reversed. The sentence restoring the ship and cargo, in the case of The Erin, was affirmed.

CATHARINA ELIZABETH, Sjobeck, master.

June 23, 1810.

Carrying to a remote port for adjudication in most cases unjustifiable.¹ Costs and damages decreed against the captor for misconduct. Freight pronounced to be due, in consequence of the interruption of a voyage by the capture and subsequent condemnation of the vessel in a remote port. Specie restored, "being to the consignment of several British merchants," though from an enemy's port. Freight due thereon. Privileges of a master, chartering his vessel for a particular purpose. Capture considered delivery, so as to entitle the owners of the vessel to freight.

A SWEDISH vessel, laden with wines and a considerable quantity

¹ [See The Wilhelmsberg, 5 C. Rob. 143.]

The Catharina Elizabeth. 1 Acton.

of dollars, on a voyage, as asserted, from Teneriffe to London, was captured 23d April, 1805, by the private ship of war Spy, in endeavoring to re-enter the port of Oratava, in the island of Teneriffe. No papers were found on board. The ship was carried to Barbadoes, where she, together with that part of her cargo consisting of wines, and also \$500, the private property of the master, were restored; the remainder of the specie was condemned.

The *King's Advocate*, for the appellants. The nature and circumstances of this case call imperiously upon the court to mark with peculiar sentiments of disapprobation the unjustifiable conduct of the captors. This vessel, under charter-party, sailed with a cargo * from London to Oratava, where she proceeded to [* 310] take in a return cargo of wine and some dollars. Whilst this vessel was lying off and on, waiting for the master, who was on shore, procuring his papers relative to this cargo, she was seized by The Spy. The master, seeing the capture from the shore, in vain attempted to prevail on some Spanish seamen to put him on board his own vessel, and, being unable to learn to what port his ship had been carried, sailed for England. The captors put men on board to navigate her, and removed five of her crew, consisting in all of seven men, on board The Spy, one of whom shortly after fell, in an action with a French vessel, which finally captured The Spy. The prize-master carried this vessel to Barbadoes, although he must have been aware of the danger of bringing a vessel bound for Europe to so remote a port for adjudication. In that port the vessel suffered so severely by accident, that she, on appraisement, appeared to have been materially reduced in value, and was reported to be worth no more than 250*l*. Upon the sound and just principles which have regulated the decision of the High Court of Admiralty in The Anna, La Porte,¹ a similar case of unjustifiable detention and removal to a distant port, in which the court observed, that the discretion granted to cruisers by the general instructions to bring in prizes to some convenient port, should be cautiously examined; no plea of even a mutinous disposition in the crew would be admitted as a sufficient sanction or apology for similar misconduct. In the case of The Maryland,² this court was of opinion the captor, a Liverpool privateer, was highly censurable for carrying her prize, which had almost reached the coast of Europe, back to the West Indies, although it was * argued the privateer was bound there [* 311]

¹ 5 Rob. Rep. 385.

² Lords, 1797.

The Catharina Elizabeth. 1 Acton.

direct; the court decreed a restitution, with costs and damages. These judgments reflect honor upon the courts of prize in this country, and must be decisive of the present case. In the papers of this case are found some, it is presumed, of a suspicious nature, and reflecting on the proof of property. One is a bill of lading for the wines, for account of merchants of Hamburg, to be delivered at Tonningen to these merchants; another is a letter from Scott, Idle, & Co., of London, to the same merchants, purporting to acknowledge the receipt of an ostensible letter of order from him relating to this cargo, and engaging not to reclaim the same from these merchants in case of detention. This, it must be evident, was an innocent attempt to render this trade from a Spanish island practicable and safe as against the enemy. As the vessel had obtained a license from his Majesty to import the said goods to Great Britain, and these Hamburg merchants have, by papers now produced, on oath disclaimed all interest in this property, there can be no other reason afforded for her possessing such papers. The dollars condemned are proved to have been taken on board by the captain, to the consignment of several British merchants. From these circumstances the appellant trusts the court will consider him entitled to recover the dollars condemned in the court below, pronounce freight to be due on the wines, and condemn the captor in costs and damages.

Arnold, for owners of the wines, contended no freight could be fairly demanded: first, because the voyage, so far as respected these owners, and to which the charter-party had reference in [*312] point of fact, never commenced, * as it was for the importation of wines, which could only begin after the cargo was completed and the ship had sailed in the usual way; secondly, the vessel having sailed under an express license, it was the duty of the master to conform thereto. In taking, therefore, the dollars on board, he so far forfeited the protection of the license, which did not comprise this sort of property in the articles therein specified, and thence the consequence of the detention of the vessel should be visited upon himself. As the license had been procured for the express purpose of importing wines, such a conduct was a violation of his engagement.

Stephen, in reply, observed — The charter-party contracted that, on delivery at London, freight should be paid, in full satisfaction both for the outward and homeward voyage. It was a maxim, capture was always considered delivery, to entitle the party to freight. By the charter-party, also, his cabin was reserved to him and his sole

The *Josephine*. 1 Acton.

use ; the dollars, therefore, might be carried without any breach of engagement. Indeed had he taken half a cargo of enemy's property on board after he had received these wines, he could not be said to violate his engagement ; as the charter-party only bound him to take on board what was there provided for him. If the master had broken this contract, an action might be sustained against him hereafter upon that breach. The decision in this case would not affect the parties in such an action at common law. The alleged cause of her detention was a suspicion entertained that she was trading between the ports of the enemy.

* SENTENCE.

[*313]

The court pronounced for the appeal, retained the principal cause, therein condemned the captors in costs and damages sustained by the owners of the ship subsequent to the capture, including the freight which would have been due upon the cargo claimed on behalf and decreed to belong to Messrs. Scott, Idle, & Co., in case the same had been delivered pursuant to the charter-party, and moreover pronounced freight to be due upon the dollars condemned in the court below.

JOSEPHINE, Chilton, master.

June 30, 1810.

Importation of gum from Senegal, under license. Property imported on account of an enemy not protected by a general license.¹

Property, upon which an enemy has a lien to a certain extent, subject to confiscation to that extent, although no part can be specifically proved to be actually that to which he might be entitled, and the lien acquired under a written agreement, upon a balance of accounts.

AN American ship, bound from Senegal to London, with a cargo of gum, for account of British and neutral owners, under protection of his Majesty's license, was captured on the 26th October, 1806, and sent in for adjudication. In the High Court of Admiralty the ship was restored, by consent, to the American claimant. The principal part of the cargo was pronounced to be British and American property, and restored ; and the remainder condemned as enemy's pro-

¹ [The Beurse Van Koningsberg, 2 C. Rob. 169, note.]

The *Josephine*. 1 Acton.

perty, not protected by his Majesty's license. From this sentence, restoring the principal part of the cargo, the captor and his Majesty's Procurator-General prosecuted an appeal, to which the claimant's proctor brought in an adhesion, so far as respected the parts of the cargo condemned.

[*314] * *Stephen and Arnold*, for the claimants, contended —

That the captor had no reason to be dissatisfied with the sentence of the High Court of Admiralty, restoring the bulk of this cargo, since the documents in the cause clearly proved the property to belong as claimed. By the attestation of Mr. Wilson, of London, it appeared he had long been engaged in trading to Senegal, and procuring thence cargoes of gum, to be imported into England, for the use of various manufactories in this country, and that he had supplied nearly three fourths of the quantity necessary for this supply for several years past. The difficulties attending this trade to an enemy's colony were considerable, and recourse was necessarily had to artifice and concealment, in order to protect property embarked in a speculation so hazardous; false papers were therefore put on board, to protect the vessel from enemy's cruisers. Wilson entered into an agreement with a Mr. Waterman, an American, who proceeded to Senegal, to provide a cargo of gum, to be imported into England for their mutual account. In May, 1806, he chartered the American ship *Rufus*, for Senegal, and obtained a license from his Majesty to import on board the said ship a cargo of gum from Senegal, but which he afterwards considered was not sufficiently general for the peculiarly critical nature of the trade in which he was engaged; he therefore procured the license to be altered at the council office, by inserting therein, "or any other neutral ship." With this license The *Rufus* arrived at Senegal, when the design of sending her back to England was abandoned, and the cargo procured by Waterman imported on board the American vessel *Josephine*, under the protection of the said license.

Upon the arrival of the ship in [*315] England, * and even until Mr. Waterman's return to this country, he considered the cargo exclusively their property, as he deposed in his first attestation of claim. He, however, had since been informed of arrangements made by his partner with which he had reason to be dissatisfied; of which the attestation of Mr. Waterman gave the following account. During his (Mr. Waterman's) stay at Senegal he had received great personal civilities from the French governor, Blanchet, by which he was enabled to carry on a trade direct to this country. He had been induced at the request of the governor to ship for him on a former occasion 1,200 pounds of

The Josephine. 1 Acton.

gum, on board a vessel destined for London, the proceeds of which were remitted for the use of the governor's daughter, who was then at school in Paris. Some time after, the governor again informed him he was desirous to remit another sum to Europe for a similar purpose, and requested him to give a bill on London payable at Paris for 5,000 francs, and in exchange offered to give him 5,000 pounds weight of gum. Finding it inconvenient to draw upon London, yet being anxious to accommodate him, both on account of the kindness he had received and the expediency of complying with the wishes of the governor under the particular circumstances of his situation, he proposed to send this quantity of gum on board this ship freight free, to be disposed of at London, and remit the proceeds to Paris for the use of Mademoiselle Blanchet. To this the governor acceded, and the 5,000 pounds weight constituted part of the cargo of The Josephine at the time of the capture. With respect to another part of this cargo, consisting of 12,000 pounds weight of gum, Mr. Waterman deposed, that in the course of his trade he became connected with Mr. Filleul, a Frenchman, * agent [* 316] of a house at Hamburg. They occasionally accommodated each other with gum and other articles. About the time of his departure from Senegal a balance on this account remained due to Filleul, amounting to 12,000 pounds, which finding it inconvenient to discharge at Senegal, he engaged to pay him the amount thereof in London from his own share of the proceeds of The Josephine's cargo, subject, however, to a deduction of the expense of freight and usual commission, and subscribed with his initial the following acknowledgment: "These are to certify that I have received of Mr. Filleul 12,000 pounds gum, all the expenses here he has paid me; the freight and expenses to Europe, loss or gain of weight, and other expenses, are to be borne in proportion to the cargo, after deducting all these, com., &c., the proceeds are for him. W." This mode of liquidating his debt he was compelled to adopt from inability to pay in specie, not with any intention to cover the property of an enemy, considering Filleul at the time to be a neutral subject, as he had a passport from the governor of his Majesty's settlements at Goree. No part of the cargo was ever shipped by or on account of Filleul; nor any part of the cargo considered the specific gum which was owing to him. He had no interest in the cargo. The debt could not be cancelled but by payment thereof in London, nor was it intended Filleul should incur any risk with respect to any part of the cargo. Being apprehensive lest the actual destination of the cargo to London should be detected in the enemy's colony, Mr. Waterman did not advise his partners of the transaction. During his absence Filleul called at Mr.

The Josephine. 1 Acton.

Wilson's counting-house, requesting a loan of money, as he [* 317] was much inconvenienced from the *circumstance of Mr. Waterman's delay, who was, he said, considerably indebted to him. He received 30*l.* from Mr. Wilson, who considered him a distressed man, for which he gave his bill of exchange on Mr. Le Clerc, his employer at Hamburg. On Mr. Waterman's arrival, finding his partner much displeased by this shipment of the governor's property, he forbore to acquaint him of the arrangement made with Filleul. By a second and subsequent affidavit Mr. Wilson deposed, that the whole cargo, except the 5,000 pounds mentioned, was purchased by funds arising from the proceeds of various goods sent out by him in different ships to Senegal, under his Majesty's licenses. Having imported with his own capital three fourths of the gum brought into Great Britain within these fifteen years; for the protection of which importation government had granted him licenses long prior to the grant of any other, from a conviction of its indispensable necessity in the various manufactures of this country. The trade was attended with great difficulties, and it was particularly necessary to conciliate the governors of the colony. Hence he felt it absolutely necessary to make the remittance of 2,400 francs in April, 1807, as the proceeds of 5,000 pounds for the use of Mademoiselle Blanchet, lest the governor should, in retaliation for the loss he had sustained, proceed to confiscate his property at Senegal and that of other British merchants. The loss in the event of the condemnation of this part of the cargo must be sustained by the claimants. The property, therefore, confiscated could not be considered that of the enemy. In fact, from the manner in which trade was carried on in that settlement, where gum was a sort of circulating medium by [* 318] which debts were paid, remittances made, and most *other articles estimated, it should be considered as a mere transfer of so much money from the colony to this country, to be remitted thence to France. The exclusive property in this gum left the governor the moment it was received on board. He only transferred a credit to an amount as yet unascertained, which was to be regulated by the state of the market here, operating upon it in the same manner as the exchange upon a remittance by money or bill, and strictly speaking, there was here no tangible property upon which a court of prize could proceed to adjudication. The same arguments were applicable in this respect to the proceeds of 12,000 pounds weight to which Filleul was entitled only in an equitable point of view, and that exclusively from Mr. Waterman, as the whole cargo, with the exception of the 5,000 pounds weight, had been purchased by the funds of Wilson only, who had consented to allow Waterman, as his agent,

The Josephine. 1 Acton.

and as a remuneration for his personal service, one fourth of the proceeds. The loss occasioned by the refusal of the captor's agent to liberate this cargo on bail, in order that it might be disposed of gradually and as circumstances might render it expedient, (being an article of very limited consumption,) amounted to upwards of 3,000*l.* which circumstance had induced the claimants to apply to his Majesty for licenses more effectually protecting their accustomed trade, and empowering them to import cargoes of gum, or such other raw commodities from that settlement as were permitted to be imported by the order of the 11th of November, 1807, to whomsoever the said goods might appear to belong, with liberty to touch at a neutral port to obtain fresh clearances. On these grounds the claimant had adhered to the appeal, and prayed restitution of these parts of the cargo.

**The King's Advocate and Dallas*, for the appellants, con- [*319] tended — That the license having been employed in attempting to cover the property of the enemy, the parties to whom it had been granted had forfeited the benefit of its protection. Nothing could be more in contradiction to the intention of the British government than such an application of its indulgence. The general principle that licenses should be taken to be *stricti juris* would be sufficient to lead to a condemnation of the whole property embarked in a speculation under a license which had been so grossly abused. The arguments adduced for restoring the parts of the cargo condemned were perfectly nugatory, founded upon the difficulty of obtaining a supply for this country, the necessity on the part of the enemy to make remittances to Europe, and the willingness of the claimants to accommodate these persons by perverting the purpose to which this license was intended to be applied. No necessity appeared to exist for a violation of national character in this trade; in fact this country had always been amply supplied without it. The necessity the enemy labored under to expose his property to capture, or the acquiescence of our merchants or neutrals in its concealment, could not entitle such parties to any indulgence. Hence the bulk of the property was subject to confiscation, but no question possibly could arise as to the liability of that property actually proved to belong to the enemy.

SENTENCE. — July 5, 1810.

The Court by interlocutory decree pronounced against the appeal and also the adhesion thereto, and affirmed the sentence of the court below.

The Europa. 1 Acton.

[*320]

* THE EUROPA, Christian, master.

July 5, 1810.

Application for admission of further proof refused. The claimants resident in Bohemia having neglected to enter a claim in proper time in the court where, after the adjudication had been reserved for a considerable time, this property was condemned, from which sentence no appeal was interposed for seven months subsequently.

THIS was a case of a Danish ship bound from Tonningen to Cadiz, condemned on the intervention of the King's Proctor in the High Court of Admiralty as prize to his Majesty. The cargo consisted of Danish and Bohemian property, as appeared by the documents on board. The court reserved the adjudication of the latter property, and the usual time having elapsed from the return of the monition, and no claim having been given for the said property, the judge decreed the property as prize to the captor, and pronounced freight to be due thereon to the crown. From this latter sentence an appeal was prosecuted on the part of the Bohemian claimants.

Arnold and Stephen, for the captor, observed — That the claimants could not be permitted to enter into proof of their claims after such unaccountable negligence and delay. The original proceedings in the court below commenced on the 14th August, 1807. Sentence upon this part of the cargo had been reserved until November, 1808, and no appeal had been interposed until June, 1809. The court, therefore, would not extend its indulgence to a party so culpably negligent in prosecuting its claim. The nature of the property itself was also extremely liable to suspicion, from the circumstance of the asserted Bohemian proprietors having consigned their respective parcels of goods as to houses at Cadiz, consisting of the same [*321] number of partners, and precisely the same names * as those of the proprietors themselves residing in Bohemia, and hence the claimants could not be entitled to any particular indulgence.

Dallas and Jenner, for the claim, attributed the delay to the unsettled state of things upon the continent during that period. The continued state of warfare in the intervening countries had rendered regular communication extremely uncertain, if not impracticable; a fact which was perfectly well known to the court, and was sufficient, in itself, to induce it to permit these proofs, which were perfectly authenticated, to be introduced.

The Europa. 1 Acton.

JUDGMENT.

SIR WILLIAM GRANT. After so great a lapse of time since the commencement of the first proceedings in the Court of Admiralty, without any reasonable account being given for the negligence of these asserted owners, first, in entering no claim in the court below, and next, in permitting so much time to elapse without an appeal, we must consider it extremely dangerous to admit any additional proof at so late a period. Indeed, we could not rely upon it if it were permitted to be introduced. We must, therefore, pronounce against the appeal.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below.

* THE HENDRICK, Hanson, master.

[* 322]

July 5, 1810.

Trade by license. The fair construction of a license continues the same notwithstanding a subsequent order of council may effect a material alteration in permissive trade generally. The petitioner not necessarily the nominee except described as such in the license.

THIS ship, under Prussian colors, bound with a cargo of wine from Bordeaux to London, under the protection of his Majesty's license, but provided with colorable papers, stating the destination to be St. Petersburg, was captured, proceeded against in the High Court of Admiralty, where the ship and cargo were restored on payment of the captor's expenses; from which sentence the captor and his Majesty's Procurator-General appealed.

For the claimant, *Dallas and Stoddart*. From the peculiar nature of the license, by which this vessel and her cargo were protected, the court cannot but concur in opinion with the learned judge below, and affirm the sentence. The license¹ granted by the secretary

¹ LICENSE.

To all Commanders of his Majesty's ships of war and privateers, and all others whom it may concern, greeting.

Whereas it hath been represented to the Lords of the Council, by Godfrey Fife &

The Hendrick. 1 Acton.

[*323] *of state to Messrs. Fiese & Co., merchants, London, is of a very unconfined description, and permits three vessels, bearing any flag, to proceed with cargoes of *wine from Bor-

Co., of London, merchants, that they are desirous of obtaining a license or pass for permitting three vessels, bearing any flag, to proceed with cargoes of the following articles from Bordeaux, or any other French port, to a port of Great Britain, grain, if importable, according to the provisions of the corn laws, seeds, saffron, rags, oak bark, turpentine, hides, skins, honey, wax, fruit, raw materials, linseed cakes, tallow, weld, wine, lace, French cambrics, and lawns, and that the masters may be permitted to receive their freight, and depart with their vessels and crews, to any port not blockaded: I, the undersigned, one of his Majesty's principal secretaries of state, in pursuance of the authority given to me by his Majesty by order of council, under and by virtue of powers given to his Majesty by an act passed in the forty-eighth year of his Majesty's reign, intituled, An act to permit goods secured in warehouses in the port of London, to be removed to the outports for exportation to any port of Europe, for empowering his Majesty to direct that licenses, which his Majesty is authorized to grant under his sign manual, may be granted by one of the principal secretaries of state, and for enabling his Majesty to permit the exportation of goods in vessels of less burden than are now allowed by law, during the present hostilities, and until one "month after the signature of the preliminary articles of peace," and in pursuance of an order of council, specially authorizing the grant of this license, a duplicate of which order of council is hereunto annexed, do hereby grant this license, for the purposes set forth in the said order of council, and do hereby direct the commanders of all his Majesty's ships of war and privateers not to interrupt the said vessels, but suffer them to proceed as aforesaid, notwithstanding all the documents which accompany the ships and cargoes may represent the same to be destined to any neutral or hostile port, provided that the names and the tonnage of the vessels, the names of their masters, and time of their clearance from Bordeaux, or other port of lading, shall be indorsed on this license; that they shall be permitted to bear the French flag only until they are two leagues distant from Bordeaux or the neighboring coast; that if they shall have borne the said flag, proof (if required) shall be given, that they are not French built, nor manned with French seamen; that if bound up channel, they shall stop at Plymouth, and proceed from thence with convoy to their ports of destination, or as long as such convoy shall be instructed to protect them. This license to remain in force for six months from the date hereof, and at the expiration of the said period, or sooner if the voyage be completed, to be deposited (as the case may be) with the commissioners of his Majesty's customs at the port of London, or with the collector of the customs at the outports.

Given at Whitehall the 15th day of March, 1809, in the forty-ninth year of his Majesty's reign.

LIVERPOOL.

Godfrey Fiese & Co. License.

(Wrote in the margin.)

This License serves for the ship Hendrick of Stettin, of 431 tons, Peter Hansen, master, and cleared at Bordeaux the 25th August, 1809.

Order in Council authorizing the above License.

At the Council Chamber, Whitehall, the 15th March, 1809. Present, the Lords of his Majesty's most honorable Privy Council.

The Hendrick. 1 Acton.

deaux, or any other French port, to great Britain, and requires the usual indorsements on the license, of the names of ships and masters, with the *tonnage of the vessels, and the time [*325] of their clearance from the port of lading. These requisitions have been complied with most strictly. The printed reasons of the captor impeach both ship and cargo, first, as enemy's property, and, secondly, as not protected by the license. The cargo is distinctly proved by the genuine papers on board to have been shipped for account of British merchants. The papers on board, representing the consignment to persons residing in Russia, are, by the master, mate, and others, admitted to be false, and put on board merely to deceive the cruisers of the enemy. The vessel is proved to be Prussian property by the bill of sale found on board, and the depositions of all the witnesses on board. But even were she not Prussian, the claimant would not be *bound by this defect, [*326] inasmuch as the license expressly protects vessels bearing any flag, and would, therefore, protect an enemy's ship, *a fortiori*

Duplicate.

Whereas, there was this day read at the board, the humble petition of Godfrey Feise & Co., of London, merchants, praying a license for permitting three vessels, bearing any flag, to proceed with cargoes of the following articles from Bordeaux, or any other French port, to a port of Great Britain, namely, grain, (if importable, according to the provisions of the corn laws,) seeds, saffron, rags, oak bark, turpentine, hides, skins, honey, wax, fruit, raw materials, linseed cakes, tallow, weld, wine, lace, French cambrics, and lawns; and that the masters may be permitted to receive their freight, and depart with their vessels and crews to any port not blockaded. Which petition being taken into consideration, it is hereby ordered in council, that a license be granted to the petitioners for the purpose above set forth, notwithstanding all the documents which accompany the ships and cargoes may represent the same to be destined to any neutral or hostile port, upon condition that the names and tonnage of the vessels, the names of their masters, and the time of their clearance from Bordeaux, or their port of lading, shall be indorsed on the said license, that they shall be permitted to bear the French flag only until they are two leagues distant from Bordeaux, or the neighboring coast; that if they shall have borne the said flag, proof (if required) shall be given, that they are not French built, nor manned with French seamen; that if bound up channel, they shall stop at Plymouth, and proceed from thence with convoy to their ports of destination, or as long as such convoy shall be instructed to protect them. Such license to remain in force for six months from the date hereof, and at the expiration of the said period, or sooner if the voyage be completed, to be deposited, as the case may be, with the commissioners of his Majesty's customs of the port of London, or with the collector of the customs at the outports. And the right honorable the Earl of Liverpool, one of his Majesty's principal secretaries of state, is hereby specially authorized to grant such license, in case his lordship shall see no objection thereto, annexing to such license the duplicate of this order herewith sent for that purpose. STEPHEN COTTRELL.

The Hendrick. 1 Acton.

enemy's property in the cargo. In the case of *The Josephine*,¹ your lordships were of opinion a license granted to import generally a cargo of a certain description, would not avail to protect any part of such a cargo appearing to be the property of the enemy, or upon which cargo an enemy had a claim in bulk to a certain extent. Here, however, no doubt can be entertained that the license, from its peculiar construction, would extend to a much greater length than that required for the protection of this ship and cargo. In this instance the motive of the government in granting licenses is completely developed. For general licenses are not granted as a matter of favor to the applicant, but through political motives, and actually with an intention to drive the trade of the country in articles of a certain description, interdicted generally by the system of retaliation this country has been compelled to adopt by the aggression of the enemy. And upon this principle it is that we find the benefit of such licenses is not intended to be confined to the party making the application; since they may, without danger, be transferred to others not named in the license. Thus, in the present case, the license is granted at the request of Messrs. Fiese & Co., and the importation made for the account of Messrs. Rucker & Co. and Messrs. Tastet & Co. In the court below the captor's costs were granted, most probably from the circumstance of the master's having concealed from the knowledge of the captor that he was

protected by license, and not having produced it until after [*327] the ship arrived into Plymouth. *This might be the result of laudable caution on the part of the master with respect to so valuable a cargo, as he stated he did not know whether the captor was French or English for some days, but this inadvertence can by no means affect the subject of costs in this court. We therefore submit the appeal is vexatious, and should be dismissed with costs.

The *King's Advocate* and *Stephen*, for the captors. The question before the court involves considerations of considerable magnitude and interest; the nature of the authority by which licenses are granted, and the length to which the protection by licenses may extend. This license appears to have been granted in reference to the order² annexed to it; and must, therefore, be considered to be granted for the use of the petitioners exclusively, and a matter of personal favor. The permission to trade by license being an infringement or modification of the general law, prohibiting all trade with the enemy, should, therefore, be construed most strictly. The privilege is incapable of being transferred to others not named in the par-

¹ *Supra*, p. 315.

² Note, *supra*, p. 324.

The Hendrick. 1 Acton.

ticular grant. This was the sentiment of the court below, in giving judgment in the case of *The Jonge Johannes*.¹ Thus stood the doctrine in 1802; nothing has since occurred to change it. Indeed it would be a subject of considerable alarm, if, in the case of a license granted to A, B could come into court and justify his trading with the enemy, in consequence of the license having been transferred to him. The great object of government, in reserving the grant of these licenses within its immediate control, is to prevent improper persons obtaining this dangerous exemption from the restrictions *imposed by the war, which would be altogether [*328] frustrated by permitting a transfer. Notwithstanding what has been said upon the unrestricted nature of the license, it is obvious the grant is not intended to be made to three ships to import cargoes, but to these persons to import three cargoes. No satisfactory proof of property has been exhibited, and it has been maintained none is necessary, as the license is sufficiently general to protect even that of the enemy. Upon this part of the case it will be necessary to refer to the construction of the several orders in council, regulating this species of trade during the present war. The order of the 11th of November, 1807, restricted generally all trade with those ports of France, her allies, or other nations from which the British flag was then excluded, with various exceptions; amongst which was one in favor of vessels or their cargoes not at war with his Majesty, and coming from restricted ports direct to ports in Europe belonging to his Majesty. This was followed by the order of the 26th November, 1807, which sanctioned the importation of goods into Great Britain from any port in Europe, except ports specially notified to be in blockade, to whomsoever the said goods might appear to belong. That of the 26th April, 1809, revoked the former existing orders, and denominated the trade to France, Holland, and their colonies, and also to the northern ports of Italy, from Pesara to Orbitello, illegal.

BY THE COURT.

SIR JOHN NICHOL. As things stood previous to the order of the 26th April, would not this property have been protected? The order of the 27th November, 1807, *appears to contain [*329] a clause protecting even the property of the enemy on such a destination.

The Hendrick. 1 Acton.

So it would appear; but the order of the 26th of April revokes the enactment in favor of such a trade, and this importation did not take place until long after, the ship's clearance from Bordeaux bearing date the 24th August.

BY THE COURT.

SIR W. GRANT. The question is, whether every license granted since the order of 27th November is to be construed in reference to that order. The order is made in favor of vessels belonging to states not at war with us, and protects goods on board such vessels coming for importation here, to whomsoever belonging. The license certainly was not intended to restrict but extend the order.

The parties should not be permitted to protect themselves, at one time referring to the letter of the instructions, at another to that of the license. And while they require that they should not have less than the benefit of the order previously issued, if no license whatever had been granted, we have a right to demand that they should not have more than the benefit of the license, as though no such order had been in existence; particularly when it is considered the parties claiming it are British merchants, and, therefore, least entitled to favor in a transaction of this nature, where the indulgence proceeds altogether upon the presumption of the honorable intention and good faith of the applicants.

[* 330] * JUDGMENT.

SIR W. GRANT. It appears to us, that whatever was the fair construction of the license when issued, it must necessarily continue the same while it remains in force. Government could never have intended to restrict the license more than the general order. It is perfectly fair to construe the license favorably for the parties claiming, if it can be done by a reference to these instructions. And it is also necessary to observe that the petitioner, in this instance, is not the nominee, the license being granted merely at his request; while in the case of *The Josephine*,¹ the permission was given expressly to the claimants, by name, to import a cargo on board *The Rufus*, or any other neutral ship. The only remaining question for our determination is, whether the license is to alter in consequence of a variation occasioned by the order subsequently issued? We apprehend not. The judgment was therefore right, and must be affirmed.

¹ *Vide supra*, 315.

The Falcon. 1 Acton.

SENTENCE.

Pronounced against the appeal, affirmed the sentence appealed from, and remitted the cause.

* **FALCON, Atkins, master.**

[* 331]

June 19, 1810.

Costs. Condemnation in the costs of an appeal, where it appeared the appellant had entered into a written agreement to avail himself of the neutral character to protect the speculations and property of an enemy.

In this case the court, having pronounced against the appeal as a clear case of fraudulent concealment of the property of the enemy, an application was made by his Majesty's Advocate to condemn the appellant in the costs of the appeal. Amongst the papers introduced on the part of the captors were found articles of agreement entered into between the appellant, Victor Halbran, residing in New York, and Messrs. Gramont, Chageray, & Co., of Bordeaux, dated 23d of June, 1805; by which it was agreed between these parties to found a house of trade in the name of Mr. Halbran¹ solely, expressly for the purpose of serving as an *entrepot*, or "medium, for the relations between Europe and the colonies, interrupted by the war." This arrangement, or partnership, to continue for three years, and an equal partition to be made by the parties of all the profits resulting from commissions, consignments, and speculations mutually entered into; Mr. Halbran, for whom the house at Bordeaux had provided very extensive credits in America, Amsterdam, Hamburg, and London, particularly binding himself "to cover with his name and as his property the operations of the house at Bordeaux, and to claim personally, if required, the property so covered."

The court condemned the appellants in the costs of the appeal.

¹ Hope, Dobell, p. 43.

The Margaret. 1 Acton.

[* 332]

*JENNET, Coursell, master.

July 19, 1810.

Freight. The sentence of a Vice-Admiralty Court having condemned the ship, with her tackle, freight, &c., and the vessel being afterwards restored upon appeal, a lien for freight upon the cargo accrues to the master or owners.

THIS vessel was restored, on appeal from the Vice-Admiralty Court of Nova Scotia, with part of her cargo. Upon an appeal being interposed by the claimants of other parts of the cargo, an intervention was made, on the part of the master, for freight. Upon arguing this part of the case,

Adams contended — That as the vessel had been restored upon appeal, the master was entitled to freight; the restoration amounting in effect to the exculpation of the master in the management of his ship upon this voyage. The freight had always been considered an appendage upon the vessel; the fate of the one involving that of the other.

The court, referring to the original proceedings in the cause, observed, that the ship, tackle, freight, &c., had been condemned in the court below. The Court of Appeals had pronounced against this sentence, and decreed the vessel should be restored. The sentence of restitution should, therefore, be construed to have comprised these several necessary appendages of the ship. The court, therefore, pronounced for the appellant, and decreed freight to be due to the master, and to be a charge upon the cargo.

[* 333]

* THE MARGARET, Heard, master.

July 21, 1810.

Contraband with false papers, suppressing its shipment and the destination to the enemy's colony. Condemnation of ship and that part of the cargo belonging to the owners of the ship, the remainder being condemned as enemy's property. The rule holds notwithstanding the vessel may have performed various different voyages, and repeatedly changed her cargoes at these several ports to which she may have traded from the time of her departure

The Margaret. 1 Acton.

from her original port to her return; nor is it necessary the return cargo should be part proceeds of the contraband on the former voyage.

THE captor having only a commission against Spain, this ship and cargo on a return voyage from Batavia to Baltimore, had been condemned in the Vice-Admiralty Court of Barbadoes as a prize to the crown and a droit of admiralty, having been employed on the outward voyage in conveying gunpowder and other contraband articles to the Isle of France, a colony of the enemy.

The *King's Advocate*, for the respondent, adverting to the case of The Rosalie and Betty,¹ contended, that upon the principles there laid down by the learned judge of the High Court of Admiralty, that the part of the return cargo which was the subject of the present appeal; namely, a moiety of certain shipments of sugar, coffee, and pepper, claimed as the property of the owners of this vessel, Messrs. M'Faden and Schwartzes, of Baltimore, (the remaining moiety, together with the residue of the goods on board, appearing to be the property of a Dutch merchant,) was justly liable to condemnation; first, because the outward cargo, consisting principally of tar and gunpowder, and such contraband articles, were, by means of false documents and suppression, carried to the Isle of France; and secondly, because the homeward cargo was also falsely documented, and this moiety of the sugar, coffee, and pepper claimed, was the produce arising from the proceeds of the said contraband.

* *Arnold and Stephen*, for the claim, contended that this [* 334] return cargo could not be considered to have any connection whatever with the objectionable outward cargo. The vessel had, since her first leaving Baltimore, entered into a completely distinct line of commerce; had performed a number of different voyages, in which she continued to be occupied from the year 1804 to 1807. In the outward voyage she touched at the Cape of Good Hope, and disposed of part of her cargo for cash; proceeded thence to the Isle of France, where the remainder was disposed of; from thence to Batavia, in ballast; again sailed with a cargo of arrack, &c. for Tranquebar; returned to Batavia with piece goods; and finally sailed with this cargo for Baltimore, after three years and four months occupied in these several voyages, four of which had intervened between that in which the objectionable cargo was carried out and

¹ 2 Rob. Rep. 343.

The Margaret. 1 Acton.

the present. In these various fluctuations and changes of property it must be supposed that any possible connection of the present with the first cargo, comprising the contraband articles, must be completely lost. This could not be considered the return cargo to the first.

BY THE COURT.

SIR JOHN NICHOL. In all these successive voyages and exchanges of property it is admitted by the master that after the first cargo, which was exclusively the property of the neutral claimants, a Dutch merchant had a joint concern of one half in each subsequent cargo, and that in the present voyage the Dutch merchant owns the whole of the cargo except the moiety of these shipments of sugar, coffee, and pepper.

[*335] * It certainly would be admitted this master had acted strangely throughout, and had been very liberal in admitting that which must be prejudicial to the interest of the claimant, who had lost upon the voyage the master in whom they reposed confidence ; and this acquiescence in the views of the captors had been amply recompensed by their indulgence, as they had restored to him all the property he had an interest in on board, with other signal marks of favor. The property of the present cargo appearing completely destitute of any connection with the first, it would be a step beyond any the court had taken on any former similar occasion, were this property considered liable to condemnation. Some boundary should be established or else it would be impossible to ascertain when a vessel might be considered exempt from the consequences of an act of delinquency, however remote.

JUDGMENT.

SIR W. GRANT. The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature, appears simply to be this, that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal, the sentence of the court below being perfectly valid, and consistent with the acknowledged principles of general law.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below condemning the property of both ship and cargo.

The Eliza. 1 Acton.

* THE ELIZA, Burrough, master.

[* 336]

July 25, 1810.

Property restored on further proof. Application for captor's costs refused — the captor having neglected to bring in the proceeds in disobedience to a monition from the court below.

In this appeal from the sentence of the Vice-Admiralty Court of Jamaica, condemning the ship and cargo, an application was made to the court for the captor's expenses, under the following circumstances.

Addams, for the captor, stated, that further proof having been permitted to be introduced in the cause: he had examined the further proofs and admitted them to be satisfactory. To prevent unnecessary trouble or delay he had proposed, on behalf of his party, to consent to the restoration of the property on payment of the captor's expenses. To this reasonable proposal the claimant had refused to assent. The captor was certainly entitled to an allowance of expenses where the claimant had recourse to further proof to substantiate his claim. As this obstinacy had been the sole cause of the parties once more presenting themselves to the court to prove what was not disputed, the claimant should, therefore, defray the captor's expenses in the present application.

Arnold, for the claim, contended the claimant was perfectly justified in refusing to take back the property by consent, when that consent was accompanied by a condition to pay a sum of money which the captors had no pretension to demand. The claimant was perfectly at liberty to come before the court, notwithstanding the offer made by the captor. Circumstances might frequently arise which would render it expedient * to make further applica- [* 337] tion. In the present case he had to complain, that notwithstanding a monition had issued in the court below for a considerable time past to bring in the proceeds, the captor's agents had neglected to comply therewith, and had to the present hour kept them back. Part, therefore, of his duty would be to apply for an attachment against the captor's agents to compel them to perform their duty.

JUDGMENT.

The court observed, that the captor's agents having so manifestly neglected their duty, no indulgence could be granted to a party under such circumstances. The application was refused, the ship and cargo restored, and an attachment decreed against the captor's agents.

The James and William. 1 Acton.

THE JAMES AND WILLIAM, Pollard, master.

July 25, 1810.

Captor's expenses. Ship and cargo sent on to England by order of Vice-Admiralty Court for sale pursuant to 41 Geo. III. sect. 9. Expense attending the providing securities to be allowed a charge upon the property. Insurance upon the same and upon freight allowed. Commission on effecting insurance; on purchase of exchequer bills.

In this case their lordships, on the 10th February, 1808, had pronounced for the appeal of the claimant, and decreed the ship and cargo to be restored, or the value thereof paid to the claimant, upon payment of the captor's expenses in both courts, referring the accompt sales of the said ship and cargo, brought in by the claimant's proctor, to the registrar and merchants to report thereon. A report was accordingly made out, which was objected to in several articles. These objections were again referred to the regis-
[*338] trar * and merchants, who reported "that in respect to the several articles so referred to them, the same ought to be allowed as in the schedule thereunto annexed."¹

1 SCHEDULE.

	Disallowed.	Allowed.
Interest on cash advanced on account sales of ship	3 17 5	
Ditto Ditto on cargo	28 2 6	
Ditto Ditto on general account	12 13 10	
These charges are set off against interest due to the claimant from the prompt of sales, till the purchase of exchequer bills.		
Premium of insurance on freight and commission	163 1 8	
½ per cent. on effecting insurance on £22,020 . . . . .	. . . . .	110 2 0
½ per cent. on purchase of exchequer bills . . . . .	. . . . .	95 0 0
½ per cent. on bill for outfit, £864, part of	1,097 5 8	4 6 5
Agency	52 10 0	
5 per cent. for the securities at Bermuda	937 14 0	
Postage . . . . .	. . . . .	0 2 3
		209 10 8
Objections on the part of the claimant.		
5 per cent. commission on outfit and expenses	52 5 0	
Allowed on outfit only £864 . . . . .	. . . . .	9 1 0
2½ per cent. ditto on sales of ship	38 10 0	
2½ per cent. ditto on sales of cargo	662 8 0	
		£200 9 8
Disallowances in former report . . . . .	. . . . .	1,732 15 2
Allowed consignees by present report . . . . .	. . . . .	200 9 8
To be accounted for by Messrs. Shedd & Co. and Atkins & Co. . . . .	. . . . .	£1,532 5 6

ARDEN, Registrar of his Majesty's High Court of Appeals for Prizes.

The James and William. 1 Acton.

For the claimant, it was objected, in reference to the charges contained in the report, that the captors had unnecessarily incurred the expenses attendant on finding securities, amounting to 937*l.* 14*s.* at the rate of 5*l.* per cent. upon the value of the ship and cargo, which had been sent by the order of the * Vice-Admiralty Court at Bermuda on to England for sale, the proceeds to be deposited in the bank to abide the decision of the Lords Commissioners of Appeal, pursuant to the act of the 41st Geo. III., section the ninth, intituled, "An act for the better regulation of his Majesty's Prize Courts in the West Indies and America, and for giving a more speedy and effectual execution to the decrees of the Lords Commissioners of Appeal." As the claimant had not required security, it was unreasonable the expenses attending the finding securities should make a part of the report. No objection having been made to letting the ship and cargo go on to England without it, there existed no ground for the charge. And finally, the claimant did not admit the usage of granting in such cases a commission of five per cent. for the securities, but considered it perfectly unprecedented. The present was the first case of this nature upon this act which had come before their lordships. An objection was also made to the demand of 163*l.* 1*s.* 8*d.* as the premium of insurance on freight and commission which had not been allowed in the registrar's report, but which was now claimed as a specific and distinct charge upon this property.

For the captor, it was argued — That the provisions of the legislature, requiring security, seemed particularly formed for the purpose of securing the interest of the claimant until final adjudication. No reasonable objection could, therefore, be made by the claimants to this charge, which was very usual, and which effectually protected his property. The insurance, likewise, on the freight was a common charge in all these cases.

* The *Registrar* observed — That the commission charged [* 340] was that usually made on giving security either in the West Indies or this country in all cases of this description.

BY THE COURT.

If, after the captor has obtained possession on finding bail, the claimant wish it to be sent on to England, he must abide the expenses legally incurred, which are in fact the result of his own request.

The James and William. 1 Acton.

The *Registrar* stated—That the reason freight had not been allowed in the schedule was, that the merchants had not considered freight so described, an insurable article.

BY THE COURT.

SIR W. SCOTT. Supposing the master had not been also owner, would not freight have been due upon this cargo?

SENTENCE.

The Court directed the registrar's report to be amended, by allowing therein 937*l.* 14*s.* paid the securities at Bermuda, and 163*l.* 1*s.* 8*d.* premium of insurance on freight from Bermuda to England, and on the said sum of 937*l.* 14*s.*

APPENDIX.

EXTRACT from his Majesty's Proclamation for regulating generally the Distribution of Prizes taken by Vessel's in his Majesty's Service.

(To which frequent reference is made in the arguments respecting The Diodeme, page 81.)

We do hereby further will and direct, that the following regulations shall be observed, concerning the one eighth part hereinbefore mentioned, to be granted to the flag or flag-officers who shall actually be on board at the taking of any prize, or shall be directing or assisting therein. First, that a captain of a ship shall be deemed to be under the command of a flag, when he shall actually have received some order directly from, or be acting in execution of some order issued by a flag-officer; and shall be deemed to continue under the command of such flag, so long as the flag-officer by whom the order was issued, or any other flag-officer acting upon the same station, shall continue upon such station; or until such captain shall have received some order directly from, or be acting in execution of some order issued by, some other flag-officer, or the Lords Commissioners of the Admiralty. Secondly, that a flag-officer, commander-in-chief, when there is but one flag-officer upon service, shall have to his own use the said one eighth part of the prizes taken by ships and vessels under his command. Thirdly, that a flag-officer, sent to command on any station, shall have no right to any share of prizes taken by ships or vessels employed there before he arrives within the limits of such station, and actually takes upon him the command, by communicating orders to the flag-officer previously in command; save only that he shall be entitled to a share of prizes taken by those particular ships to which he shall actually have given

* some order, and taken under his command within the limits of such [* 2] station. Fourthly, that a commander-in-chief, or other flag-officer, appointed or belonging to any station, and passing through or into any other station, shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a flag-officer of any other station, or under admiralty orders; unless such commander-in-chief, or flag-officer, is expressly authorized by the Lords Commissioners of the Admiralty to take upon him the command in that

APPENDIX.

station in which the prize is taken, and shall actually have taken upon him such command, in manner aforesaid. Fifthly, that when an inferior flag-officer is sent to reinforce a superior flag-officer on any station, the superior flag-officer shall have no right to any share of prizes taken by the inferior flag-officer before the inferior flag-officer shall arrive within the limits of the station, and, moreover, shall actually receive some order directly from him, or be acting in execution of some order issued by him. Sixthly, that a chief flag-officer quitting a station either to return home, or to assume another command, or otherwise, except upon some particular urgent service with the intention of returning to the station as soon as such service is performed, shall have no share of prizes taken by the ships or vessels left behind, after he shall have passed the limits of the station, or after he shall have surrendered the command to another flag-officer, appointed by the admiralty to be commander-in-chief upon such station. Seventhly, that an inferior flag-officer quitting a station (except when detached by orders from his commander-in-chief out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed) shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the flag-officers remaining on the station shall have no share of the prizes taken by such inferior flag-officer, or by the ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid. Eighthly, that when vessels, under the command of a flag, which belong to separate stations, shall happen to be joint captors, the captain of each ship shall pay one third of the share to which he is entitled to the flag-officers of the station to which he belongs. But the captains of vessels under admiralty orders, being [* 3] joint captors with other * vessels under a flag, shall retain the whole of their share. Ninthly, that if a flag-officer is sent to command in the out-ports of this kingdom, he shall have no share of the prizes taken by ships or vessels which have sailed, or shall sail, from that port by order from the admiralty. Tenthly, that when more flag-officers than one serve together, the eighth part of the prizes taken by any ships or vessels of the fleet, or squadron, shall be divided in the following proportions; *videlicet*, If there be but two flag-officers, the chief shall have two third parts of the said one eighth, and the other shall have the remaining third part; but if the number of flag-officers be more than two, the chief shall have only one half, and the other half shall be equally divided among the other flag-officers. Eleventhly, that commodores, with captains under them, shall be esteemed as flag-officers with respect to the eighth part of prizes taken, whether commanding in chief or serving under command. Twelfthly, that the first captain to the admiral and commander-in-chief of our fleet, and also the first captain to our flag-officer appointed, or hereafter to be appointed, to command a fleet or squadron of ten ships of the line of battle, or upwards, shall be deemed and taken to be a flag-officer, and shall be entitled to a part or share of prizes, as the junior flag-officer of such fleet or squadron.

Given at our court, at St. James's, the seventh day of July, one thousand eight hundred and three, in the forty-third year of our reign.

ORDERS issued by his Majesty in Council since the commencement [* 4]
of these Reports.

No. 1.

At the Court of Queen's Palace, the 21st of June, 1809 ; present, the King's
most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the fourteenth day of December, one thousand eight hundred and eight, prohibiting the transporting into any parts of this kingdom of any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, or other naval stores, will expire upon the eleventh day of July next. And whereas it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whosoever, do at any time, for the space of six months, from the said eleventh day of July next, presume to transport into any parts of this kingdom any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth, or canvas, or other naval stores, or do ship or lade any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, on board any ship or vessel, in order to transporting the same into any parts beyond the seas, without leave or permission first being had and obtained from his Majesty's privy council, upon pain of incurring the forfeitures inflicted by an act passed in the thirty-third year of his Majesty's reign, intituled, "An Act to enable his Majesty to restrain the exportation of naval stores, and more effectually to prevent the exportation of salt-petre, arms, and ammunition, when * prohibited by proclamation or [* 5] order in council." But it is, nevertheless, his Majesty's pleasure, that nothing herein contained shall extend, or be construed to extend, to any of his Majesty's ships of war, or any other ships or vessels or boats in the service of his Majesty, or employed or freighted by his Majesty's board of ordnance, or by the commissioners of his Majesty's navy ; nor to prevent any ship or vessel from taking or having on board such quantities of naval stores as may be necessary for the use of such ship or vessel during the course of her intended voyage, or by license from the Lord High Admiral of Great Britain, or the Commissioners of the Admiralty for the time being ; nor to the exportation of the said several articles to Ireland, or to his Majesty's yards or garrison's, or to his Majesty's colonies and plantations in America or the West Indies, or to Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies. Provided, that upon the exportation of any of the said articles for the purpose of trade to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to the island of Newfoundland, or to his Majesty's forts and settlements on the

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coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies, the exporters of such articles do first make oath of the true destination of the same to the places for which they shall be entered outwards, before the entry of the same shall be made, and do give full and sufficient security, by bond, (except as hereinafter excepted,) to the satisfaction of the commissioners of his Majesty's customs, to carry the said articles to the places for which they are so entered outwards, and for the purposes specified, and none other; and such bond shall not be cancelled or delivered up until proof be made, to the satisfaction of the said commissioners, by the production, within a time to be fixed by the said commissioners, and specified in the bond, of a certificate or certificates, in such form and manner as shall be directed by the said commissioners, showing that the said articles have been all duly landed at the places for which they were entered outwards. But it is his Majesty's pleasure, nevertheless, that the following articles, namely, bar-iron, white and tarred rope, tallow or mill grease, tarpaulins for wagon-covers, pitch, tar, and turpentine, shall be permitted to be exported, upon payment of the proper duties, without bond being entered into by the merchant [* 6] exporter, to any of the British * plantations in the West Indies, or to any of his Majesty's settlements in South America; provided the merchant exporter shall first verify, upon oath, that the articles so exported are intended for the use of a particular plantation or settlement, to be named in the entry outwards, and not for sale; and that the said plantation or settlement has not before been furnished with any supply of the said articles during the same season; and provided also that the exportation of the said articles shall, in no case, exceed the value of fifty pounds sterling for any given plantation or settlement, whether by one or more shipments within the same season. And the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, and the lord warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

W. FAWKENER.

No. 2.

At the Court at the Queen's Palace, the 12th of July, 1809; present, the King's most excellent Majesty in Council.

It is this day ordered by his Majesty, in council, that a general embargo be forthwith laid (to continue until further orders) upon all ships and vessels in the united kingdom of Great Britain and Ireland, except his Majesty's ships and vessels of war, and except such ships and vessels as shall be laden by the especial order, and under the directions of the lords commissioners of his Majesty's treasury, or the Lords Commissioners of the Admiralty, with any kind of provisions or stores for the use his Majesty's fleets or armies; and also except such ships and vessels as are employed by officers of the navy, ordnance, victualing, and customs. And the right honorable the lords commis-

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sioners of his Majesty's treasury, and the Lords Commissioners of the Admiralty, and the lord warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain. **W. FAWKENER.**

No. 3.

[*7]

At the Court at the Queen's Palace, the 12th of July, 1809 ; present, the King's most Excellent Majesty in Council.

WHEREAS his Majesty was, by his order in council of the thirty-first of May, one thousand eight hundred and nine, pleased to direct, that no foreign vessel, except as therein excepted, should enter into the port, harbor, or road lying between the island of Heligoland and Sandy Island, and the shoals of the said islands respectively, and commonly called or known by the names of the North Haven and the South Haven, under any pretence whatever :

His Majesty is pleased, by and with the advice of his privy council, to revoke so much of the said order as respects ships entering into the port of the said island or places thereof in ballast ; and to direct, that, henceforth, merchant vessels, under any flag except the French, coming in ballast, shall be allowed to enter therein without his Majesty's license ; and the right honorable the lords commissioners of his Majesty's treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein as to them may respectively appertain.

W. FAWKENER.

No. 4.

At the Court at the Queen's Palace, the 2d of August, 1809 , present, the King's most excellent Majesty in Council.

It is this day ordered by his Majesty in council, that the general embargo laid by his Majesty's order in council, dated the twelfth of last month, upon all ships and vessels in the United Kingdom of Great Britain and Ireland (except as therein excepted) be taken off ; and the right honorable the lords commissioners of his Majesty's treasury, the Lords Commissioners of the Admiralty, and the lord warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

STEPHEN COTTELL.

[* 8]

* No. 5.

At the Court at the Queen's Palace, the 16th of August, 1809 ; present, the King's most excellent Majesty in Council.

WHEREAS his Majesty was pleased, by his order in council, bearing date the twelfth of April, one thousand eight hundred and nine, to authorize the governors and lieutenant-governors of his Majesty's islands and colonies in the West Indies, (in which description the Bahama Islands and the Bermuda or Somer Islands were included,) and of any lands or territories on the continent of South America to his Majesty belonging, to permit for twelve months from the date of the said order, subject to be sooner terminated, varied, or altered, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, the importation into the said islands, colonies, lands, and territories respectively of certain articles enumerated in the said order, being the growth or produce of the country to which such ship or vessel importing the same should belong, and also the exportation from the said islands, colonies, lands, and territories respectively, into which the importation of staves, lumber, and provisions shall be made, of rum and molasses, and of any other articles, goods, and commodities whatsoever, except sugar, indigo, cotton-wool, coffee, and cocoa ; provided that such ships or vessels should duly enter into, report, and deliver their respective cargoes, and reload at such ports only where regular custom-houses should have been established.

But his Majesty, with the advice of his privy council, was thereby further pleased to order, that nothing therein contained should be construed to permit, after the first of November, one thousand eight hundred and nine, the importation of staves, lumber, horses, mules, asses, neat cattle, sheep, hogs, poultry, live stock, live provisions, or any kind of provisions whatsoever, into any of the said islands, colonies, lands, or territories in which there should not be, at the time when such articles should be brought for importation, a tonnage duty of not less than five shillings per ton on every ship or vessel bringing the same,

according to the admeasurement of such ship or vessel ; nor to

[* 9] permit, after the first * July one thousand eight hundred and nine, the importation of fish into any of the said islands, colonies, lands, or territories in which there should not be, at the time when such fish should be brought for importation, a duty of not less than one shilling sterling per quintal on dried or salted cod, or ling fish, cured or salted : and a proportionate duty per barrel on cured or pickled shads, alewives, mackerel, or salmon, so imported ; and also a tonnage duty to the amount above mentioned on every ship or vessel bringing such fish, according to the admeasurement of such ship or vessel.

And whereas it has been represented, that the legislature of the island of Jamaica have passed an act, imposing the duties hereinafter mentioned on the vessels and produce of the United States of America imported into that island, in addition to another law in force in the said island, laying a duty of two

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shillings sterling per quintal on codfish, and a proportionate duty per barrel on pickled shads, and other pickled fish so imported from the United States.

Which new duties are as follows:—

	Current money of Jamaica.
On the vessels, per ton	£0 6 8
On wheat flour per barrel, not weighing more than one hundred and ninety-six pounds net weight	0 6 8
On bread or biscuit of wheat flour, or any other grain, per barrel, not weighing more than one hundred pounds net weight	0 3 4
On bread, for every hundred pounds made from wheat or any other grain whatever, imported in bags, or other packages than barrels weighing as aforesaid	0 3 4
On flour or meal made from rye, pease, beans, Indian corn, or other grain than wheat, per barrel, not weighing more than one hundred and ninety-six pounds	0 3 4
On pease, beans, rye, Indian corn, callivancies, or other grain, per bushel	0 0 10
On rice, for every one hundred pounds net weight	0 3 4
And so in proportion for a less or larger quantity.	
On shingles, called Boston chips, not more than twelve inches in length, per thousand	0 3 4
On shingles being more than twelve inches in length, per thousand	0 6 8
* For every twelve hundred (commonly called one thousand) of red oak staves	0 15 0
For every twelve hundred (commonly called one thousand) of white oak staves, and for every one thousand pieces of heading	0 15 0
For every thousand feet of white or yellow pine, lumber of all descriptions	0 10 0
For every thousand feet of pitch pine lumber	0 15 0
For all other kinds of wood or timber not before enumerated	0 15 0
For every one thousand wood-hoops	0 5 0
And in proportion for less or larger quantity of all and every the articles enumerated.	
Horses, neat cattle, or other live stock, or other goods, wares, and merchandise whatsoever, which by law may be imported into Jamaica from the United States of North America, not before enumerated and taxed, for every one hundred pounds of the value thereof, at the port or place of importation	10 0 0

And whereas the tonnage duty of six shillings and eight pence current money of Jamaica is not equal to five shillings British, required by the said order to be imposed on vessels importing such articles as aforesaid, but such deficiency in the tonnage duty appears to be fully compensated by the duties as aforesaid imposed on the articles imported in such vessels: his Majesty, by and with the advice of his privy council, is thereupon pleased to authorize the governor and

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lieutenant-governor of the said island of Jamaica, and the governors and lieutenant-governors of all his Majesty's islands and colonies in the West Indies (including therein the Bahama Islands and the Bermuda or Somer Islands,) and of any lands or territories on the continent of South America to his Majesty belonging, in which duties, equal in amount, when taken together, to those imposed as aforesaid, by the legislature of the island of Jamaica have been, or shall be, granted on the importation of the several articles specified in the said order of the 12th of April, on the vessels importing the same, to permit, notwithstanding any thing in the said order of the 12th of [* 11] April last, the importation * and exportation into and from the said islands, colonies, lands, and territories, of the several articles mentioned and permitted in the said order of the 12th of April last, for the period thereby allowed, subject to be sooner determined, varied, or altered as therein expressed.

STEPH. COTTRELL.

[* 13]

* ORDERS, INSTRUCTIONS, &c.

No. 6.

Instructions. September 14th, 1809.

OUR will and pleasure is, that vessels under any flag except the French, which shall be proceeding from on board to any port or place between the rivers Swyn and Maese, both inclusive, under a license from the commander-in-chief of our forces in Walcheren, shall not be molested or interrupted, but shall be allowed to proceed on their said voyage, according to the tenor of the said license. And our will and pleasure is, and we do hereby direct, that the commanders of our ships of war and privateers, and the judge of the High Court of Admiralty, the judges of the Courts of Vice-Admiralty, do act in due conformity to and in execution of these our instructions.

No. 7.

At the Court at the Queen's Palace, 20th September, 1809; present, the King's most excellent Majesty in Council.

WHEREAS by an act passed in the forty-eighth year of his Majesty's reign, intituled "An Act for further continuing, until three months after the ratifica-

tion of a definitive treaty of peace, an act made in the forty-fourth year of his present Majesty, for permitting the importation into Great Britain of hides and other articles in foreign ships," it is enacted that an act, made in the forty-fourth year of his present Majesty, intituled "An Act for permitting, until the fifth day of May, one thousand eight hundred and five, the importation of hides, calf-skins, * horns, tallow, and wool, (except cotton [* 14] wool,) in foreign ships, on payment of the like duties as if imported in British or Irish ships ;" which, by an act made in the forty-fifth year of his present Majesty, was revived and further continued until the twenty-fifth day of March, one thousand eight hundred and six, and extended to goat-skins imported in foreign ships ; and which was further continued by an act, made in the forty-seventh year of his present Majesty, until the twenty-fifth day of March, one thousand eight hundred and eight, shall be and the same is thereby further continued until three months after the ratification of a definitive treaty of peace : And whereas his Majesty was pleased, by his order in council of the fifteenth day of March last, pursuant to the powers vested in his Majesty by the said act, to allow, for the space of six months from the twenty-fifth day of the said month of March, the importation in foreign ships of any hides, pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins, dressed or undressed horns, or pieces of horns, tallow, and wool, (except cotton wool,) and goat-skins dressed or undressed, on the terms specified in the said order : And whereas it is judged expedient for his Majesty's service that the said permission should be continued for some time longer, his Majesty is thereupon pleased, by and with the advice of his privy council, to allow, and doth hereby allow, for the space of six months from the twenty-fifth day of this instant September, the importation of any hides, pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins, dressed or undressed, horns, or pieces of horns, tallow, and wool, (except cotton wool,) and goat-skins, dressed or undressed, in any foreign ship or vessel ; and his Majesty doth hereby order that, on the arrival at any port of the United Kingdom of any foreign ship or vessel, with any of the articles above mentioned, the said goods shall be admitted to entry, on payment of the same duties of customs and excise as are due and payable on the like goods when imported in any British or Irish built ship or vessel ; and the right honorable the lords commissioners of his Majesty's treasury are to give the necessary directions herein accordingly.

STEPH. COTTRELL.

* No. 8.

[* 15]

Instructions. 27th September, 1809.

WHEREAS licenses have been granted, pursuant to the order of his Majesty's most honorable privy council, empowering certain persons to export goods and merchandises therein enumerated from ports of the United Kingdom to

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any port of Holland north of the island of Walcheren, and west of the island of Juist, under certain provisions, and with the condition that the said licenses should remain in force for the exportation of the said goods until the twenty-ninth of this instant September, which period has since been extended, in certain cases, to the third day of October, on special grounds stated to render such extension proper.

And whereas it has been represented to us that causes may arise which may prevent divers vessels sailing under the protection of the said licenses from clearing out from the ports of shipment, in such time as may enable them to complete their said voyage on or before the third day of October. We are thereupon pleased, by and with the advice of our privy council, to order, and do hereby order, that all ships which shall sail under the licenses above mentioned, and which shall have cleared out from any custom-house in Great Britain or Ireland, on or before the third day of October, shall be permitted to proceed conformably to the terms of their license, and shall not be molested or interrupted in their voyage by reason only that the time allowed for exportation may have expired previous to their arrival at the ports of destination described in the said license.

And our will and pleasure is, and we do hereby direct, that the commanders of our ships of war and privateers, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, do act in due conformity to and in execution of these our instructions.

By his Majesty's command,

LIVERPOOL.

[* 16]

* No. 9.

At the Court of the Queen's Palace, the 22d of November, 1809 ; present the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twenty-fourth day of May last, for prohibiting the exportation out of this kingdom, or carrying coastwise, gunpowder or saltpetre, or any sort of arms or ammunition, will expire upon the sixth day of December next: And whereas it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, by and with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whatsoever, (except the master general of the ordnance for his Majesty's service,) do at any time, during the space of six months, to commence from the said sixth day of December next, presume to transport into any parts out of this kingdom, or carry coastwise, any gunpowder or saltpetre, or any sort of arms or ammunition, or ship or lade any gunpowder or saltpetre, or any sort of arms or ammunition, or board any ship or vessel, in order to transporting the same into any parts beyond the seas, or carrying the same coastwise, without leave or permission

in that behalf first obtained from his Majesty or his privy council, upon pain of incurring and suffering the respective forfeitures and penalties inflicted by an act passed in the twenty-ninth year of his late Majesty's reign, intituled "An Act to empower his Majesty to prohibit the exportation of saltpetre, and to enforce the law for empowering his Majesty to prohibit the exportation of gunpowder, or any sort of arms or ammunition; and also to empower his Majesty to restrain the carrying coastwise of saltpetre, gunpowder, or any sort of arms or ammunition;" and the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of lord high admiral of Great Britain, the lord warden of the Cinque Ports, the master general and the principal officers of the ordnance, and his Majesty's secretary at war, are to give the necessary directions herein, as to them may respectively appertain.

STEPH. COTTRELL.

* No. 10.

[* 17]

Instructions. 6th December, 1809.

OUR will and pleasure is, that Swedish vessels proceeding from any port of Sweden, laden with corn, direct to any port of Norway, be allowed to pass without molestation. And that they be allowed also to return from any port of Norway to any Swedish port, without the Baltic, laden with any goods, naval and military stores excepted.

By his Majesty's command,

R. RYDER.

No. 11.

At the Court at the Queen's Palace, the 20th of December, 1809; present the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twenty-first day of June last, prohibiting the transporting into any parts out of this kingdom of any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, or other naval stores, will expire upon the eleventh day of January next: And whereas it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whosoever do any time for the space of six months, from the said eleventh day of January next, presume to

transport into any parts out of this kingdom any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, or [* 18] do ship or lade any pig-iron, bar-iron, hemp, * pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, on board any ship or vessel, in order to transporting the same into any parts beyond the seas, without leave or permission first being had and obtained from his Majesty or his privy council, upon pain of incurring the forfeitures inflicted by an act passed in the thirty-third year of his Majesty's reign, intituled, "An Act to enable his Majesty to restrain the exportation of naval stores, and more effectually to prevent the exportation of saltpetre, arms, and ammunition, when prohibited by proclamation or order in council." But it is nevertheless his Majesty's pleasure, that nothing herein contained shall extend, or be construed to extend, to any of his Majesty's ships of war, or any other ships or vessels or boats in the service of his Majesty, or employed or freighted by his Majesty's board of ordinance, or by the commissioners of his Majesty's navy; nor to prevent any ship or vessel from taking or having on board such quantities of naval stores as may be necessary for the use of such ship or vessel during the course of her intended voyage, or by license from the Lord High Admiral of Great Britain, or the Commissioners of the Admiralty for the time being; nor to the exportation of the said several articles to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies: Provided, that upon the exportation of any of the said articles for the purpose of trade to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to the island of Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies, the exporters of such articles do first make oath of the true destination of the same to the places for which they shall be entered outwards, before the entry of the same shall be made, and do give full and sufficient security by bond, (except as hereinafter excepted,) to the satisfaction of the commissioners of his Majesty's customs, to carry the said articles to the places for which they are so entered outwards, and for the purposes specified, and none other; and such bond shall not be cancelled or delivered up until proof be made [* 19] to the satisfaction of the said commissioners, by the * production, within a time to be fixed by the said commissioners, and specified in the bond, of a certificate or certificates, in such form and manner as shall be directed by the said commissioners, showing that the said articles have been all duly landed at the places for which they were entered outwards; but it is his Majesty's pleasure, nevertheless, that the following articles, namely, bar iron, white and tarred rope, tallow or mill grease, tarpaulins for wagon covers, pitch, tar, and turpentine, shall be permitted to be exported, upon payment of the proper duties, without bond being entered into by the merchant exporter,

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to any of the British plantations in the West Indies, or to any of his Majesty's settlements in South America; provided the merchant exporter shall first verify, upon oath, that the articles so exported are intended for the use of a particular plantation or settlement, to be named in the entry outwards, and not for sale; and that the said plantation or settlement has not before been furnished with any supply of the said articles during the same season; and, provided also, that the exportation of the said articles shall, in no case, exceed the value of fifty pounds sterling for any given plantation or settlement, whether by one or more shipments within the same season; and the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, and the lord warden of the cinque ports, are to give the necessary directions herein as to them may respectively appertain.

W. FAWKENER.

No. 12.

Order. 31st January, 1810.

WHEREAS, certain vessels under the imperial Austrian flag have been detained at Malta in consequence of an embargo, although furnished with his Majesty's license permitting them to trade between the ports of the United Kingdom and ports of the Mediterranean; and whereas, the terms for which such licenses were granted may, in consequence of such detention, have expired or may be so near expiring as not to allow sufficient time for such vessels to complete their respective voyages; his Majesty, by and with the advice of his privy council, is pleased to order, and it * is hereby ordered, [* 20] that the governor, lieutenant-governor, or other person having the chief civil command in Malta, do and shall, in his Majesty's name, extend the term of each of such licenses, either by indorsement on the original licenses respectively, or in any other form that may appear to be most advisable, for a time equal to the time which shall appear to have been lost by the detention of the vessel described in each of such licenses respectively, in consequence of the embargo above mentioned: Provided, however, that such extension of time shall be granted only to vessels trading from or to the United Kingdom, which may require such relief in consequence of detention by such embargo; and that such extension of time shall in no case exceed the time during which the vessel detained shall have been detained by means or in consequence of such embargo. And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Courts of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

(Signed)

W. FAWKENER.

No. 13.

At the Court at the Queen's Palace, the 7th of February, 1810; present the King's most excellent Majesty in Council.

WHEREAS it has been humbly represented to his Majesty, that the islands of Feroe and Iceland, and also certain settlements on the coast of Greenland, parts of the dominions of Denmark, have, since the commencement of the war between Great Britain and Denmark, been deprived of all intercourse with Denmark, and that the inhabitants of those islands and settlements are, in consequence of the want of their accustomed supplies, reduced to extreme misery, being without many of the necessaries and of most of the conveniences of life :

His Majesty, being moved by compassion for the sufferings of these [* 21] defenceless people, has, by and with the advice of his privy * council, thought fit to declare his royal will and pleasure, and it is hereby declared and ordered, that the said islands of Feroe and Iceland and the settlements on the coast of Greenland, and the inhabitants thereof, and the property therein, shall be exempted from the attack and hostility of his Majesty's forces and subjects, and that the ships belonging to inhabitants of such islands and settlements, and all goods, being of the growth, produce, or manufacture of the said islands and settlements, on board the ships belonging to such inhabitants, engaged in a direct trade between such islands and settlements respectively, and the ports of London or Leith, shall not be liable to seizure and confiscation as prize.

His Majesty is further pleased to order, with the advice aforesaid, that the people of all the said islands and settlements be considered, when resident in his Majesty's dominions, as stranger friends, under the safeguard of his Majesty's royal peace, and entitled to the protection of the laws of the realm, and in no case treated as alien enemies.

His Majesty is further pleased to order, with the advice aforesaid, that the ships of the United Kingdom, navigated according to law, be permitted to repair to the said islands and settlements, and to trade with the inhabitants thereof.

And his Majesty is further pleased to order, with the advice aforesaid, that all his Majesty's cruisers, and all other his subjects, be inhibited from committing any acts of depredation or violence against the persons, ships, and goods of any of the inhabitants of the said islands and settlements, and against any property in the said islands and settlements respectively.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

W. FAWKENER.

* No. 14.

[* 22]

At the Court at the Queen's Palace, the 7th February, 1810; present the King's most excellent Majesty in Council.

WHEREAS, by an act made and passed in the forty-sixth year of his Majesty's reign, intituled, "An Act for authorizing his Majesty in council to allow, during the present war, and for six months after the ratification of a definitive treaty of peace, the importation and exportation of certain goods and commodities in neutral ships, into and from his Majesty's territories in the West Indies and continent of South America;" it is enacted, that from and after the passing of the said act, it shall and may be lawful for his Majesty, his heirs, and successors, by and with the advice of his and their privy council, to permit or to authorize the governors of the said islands and territories, in such manner, and under such restrictions as to his Majesty, by and with the advice of his privy council, shall seem fit, to permit, when the necessity of the case shall appear to his Majesty, with the advice of his privy council, to require it, from time to time, during the present war, and for six months after the ratification of a definitive treaty of peace, the importation into, and exportation from any island in the West Indies, (in which description the Bahama islands and the Bermuda or Somer islands are included,) or any lands or territories on the continent of South America, to his Majesty belonging, of any such articles, goods, and commodities as shall be mentioned in such order of his Majesty in council, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, in such manner as his Majesty, his heirs, and successors, by and with the advice aforesaid, shall direct, whereupon certain orders of council were made on the twelfth day of April, one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, and the tenth day of January, one thousand eight hundred and ten, which orders were made to continue in force for a limited time. And whereas it appears at present to be necessary, to permit for a further limited time, subject to be sooner terminated, varied, or altered, as is hereinafter provided, the importation into and exportation from the islands and * territories of his Majesty [* 23] in the West Indies, (including the Bahama islands and the Bermuda or Somer islands,) and the lands and territories on the continent of South America, to his Majesty belonging, of certain articles, goods, and commodities hereinafter mentioned, in ships or vessels belonging to the subjects of any state in amity with his Majesty; his Majesty is thereupon pleased, by and with the advice of his privy council, to order, and it is hereby ordered, that the said three orders of council made on the twelfth day of April, one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, and the tenth day of January, one thousand eight hundred and ten, shall continue and be in force until the first day of December, one thousand eight hundred and ten, and that from and after the first day of December, one thousand eight hundred and ten, it shall be lawful for the governor or lieutenant-governor, of any of his Majesty's islands in the West Indies, (in which description the

Bahama islands, and the Bermuda or Somer islands are included,) and of any lands or territories on the continent of South America, to his Majesty belonging, to permit, until the first day of December, one thousand eight hundred and eleven, subject to be sooner terminated, varied, or altered, as hereinafter provided, in ships or vessels belonging to the subjects of any state in amity with his Majesty, the importation into the said islands, land, and territories, respectively, of staves and lumber, horses, mules, asses, neat cattle, sheep, hogs, and every other species of live stock, and live provisions, and also of every kind of provisions whatsoever, (beef, pork, and butter excepted,) and also the exportation from the said islands, lands, and territories respectively, into which importation as aforesaid shall be made of rum and molasses, and of any other goods and commodities whatsoever, except sugar, indigo, cotton wool, coffee, and cocoa ; provided always, that such articles so to be imported, except staves and lumber, shall be of the growth or produce of the country to which the ship or vessel importing the same shall belong, and that staves and lumber shall be imported from the country to which the ship or vessel importing the same shall belong ; provided also, that such ships or vessels should duly enter into, report, and deliver their respective cargoes, and reload at such ports only, where regular custom-houses shall have been established.

But it is his Majesty's pleasure, nevertheless, and his Majesty, by and with the advice of his privy council, is further pleased to order, and has [* 24] * hereby ordered, that nothing hereinbefore contained, shall be construed to permit, after the said first day of December, one thousand eight hundred and ten, the importation of staves, lumber, horses, mules, asses, neat cattle, sheep, hogs, poultry, live stock, live provisions, or any kind of provisions whatsoever as aforesaid, into any of the said islands, lands, or territories in which there shall not be, at the time when such articles shall be brought for importation, the following duties on such articles being of the growth or produce of the United States of America, namely :

	Sterling Money.
For every quintal of dried or salted cod or ling fish, cured or salted	£0 2 6
For every barrel of cured or pickled shads, alewives, mackerel, or salmon, a proportionate duty.	

	Current Money of Jamaica.
On wheat flour, per barrel, not weighing more than one hundred and ninety-six pounds net weight	£0 6 8
On bread or biscuit of wheat flour, or any other grain, per barrel, not weighing more than one hundred pounds net weight	0 3 4
On bread, for every hundred pounds made from wheat or any other grain whatever, imported in bags, or other packages than barrels, weighing as aforesaid	0 3 4
On flour or meal made from rye, peas, beans, Indian corn, or other grain than wheat, per barrel, not weighing more than one hun- dred and ninety-six pounds	0 3 4
On peas, beans, rye, Indian corn, callivances, or other grain, per bushel	0 0 10

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xxv

	Current Money of Jamaica.
On rice, for every one hundred pounds net weight	0 3 4
And so in proportion for a less or larger quantity.	
On shingles called Boston chips, not more than twelve inches in length, per thousand	0 3 4
On shingles, being more than twelve inches in length, per thousand	0 6 8
For every twelve hundred (commonly called one thousand) of red oak staves	1 0 0
For every twelve hundred (commonly called one thousand) of white oak staves, and for every one thousand pieces of heading	0 15 0
* For every one thousand feet of white or yellow pine, lumber of all descriptions.	[* 25] 0 10 0
For every thousand feet of pitch pine lumber	0 15 0
For all other kinds of wood or timber not before enumerated	0 15 0
For every one thousand wood-hoops	0 5 0
And in proportion for a less or larger quantity of all and every the articles enumerated.	
Horses, neat cattle, or other live stock, for every one hundred pounds of the value thereof, at the port or place of importation	10 0 0

And his Majesty, by and with the advice of his privy council, is further pleased to order, and it is hereby ordered, that notwithstanding any thing hereinbefore contained, the said permission and authority to import and export shall cease and determine, or be varied and altered before the expiration of the above-mentioned period of the first day of December, one thousand eight hundred and eleven, at the expiration of six months after the notification in the London Gazette, of any order of his Majesty, by and with the advice of his privy council, for revoking, varying, or altering such permission and authority, or shall cease and determine at the expiration of six months after the ratification of a definitive treaty of peace.

W. FAWKENER.

No. 15.

Foreign Office. February 20, 1810.

THE Marquis Wellesley, his Majesty's principal secretary of state for foreign affairs, has this day notified to the ministers of friendly and neutral powers resident at this court, that his Majesty has judged it expedient to direct that the necessary measures should be taken for the blockade of the coast and ports of Spain from Gijon to the French territory; and that the same will be maintained and enforced in the strictest manner, according to the usages of war acknowledged and allowed in similar cases.

[* 26]

* No. 16.

At the Court at the Queen's Palace, 21st February, 1810; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted pursuant to the order of his Majesty's most honorable privy council, empowering certain persons to import grain, meal, flour, and burr stones, from ports of France and Holland to ports of the United Kingdom: and whereas it has been represented that causes may have arisen, or may arise, which may have prevented, or may prevent, divers vessels sailing under the protection of the said licenses, from clearing out from the ports of shipments in such time as to be enabled to complete their voyage within the time allowed by the said licenses respectively:

His Majesty, by and with the advice of his privy council, is pleased to order, and it is hereby ordered, that all such licenses as aforesaid, (notwithstanding the same may have actually expired,) which shall not have been used for the importation of any such cargo into this kingdom, shall receive the further extension of time hereinafter specified: that is to say, licenses to import the above-mentioned articles from ports between Brest and Bordeaux, the further term of five weeks; between Boulogne and Conquet, four weeks; between Slays and Calais, four weeks; and from Holland, north of the island of Walcheren, or west of the island of Juist, four weeks.

And it is hereby further ordered, with the advice aforesaid, that any vessel coming with the articles aforesaid, and no other, to any port of the United Kingdom, under the protection of any such license heretofore granted, which shall be detained and proceeded against for legal adjudication, shall be immediately liberated, together with the cargo, upon bail being given to answer adjudication.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

[* 27]

* No. 17.

At the Court at the Queen's Palace, the 10th of April, 1810; present, the King's most Excellent Majesty in Council.

WHEREAS, by virtue of the powers vested in his Majesty by sundry acts of parliament, his Majesty was pleased, by his order in council, bearing date the 12th of April last, to allow, and did thereby allow, until the twenty-fifth day of March, one thousand eight hundred and ten, the importation into any port

or place of Great Britain, of certain articles of provision in the manner and under the conditions therein mentioned ; and whereas by an act, passed in the present session of parliament, it is enacted, that an act, made in the thirty-ninth year of his present Majesty, intituled, " An Act for enabling his Majesty to prohibit the exportation, and permit the importation of corn, and for allowing the importation of other articles of provision without payment of duty, to continue in force until six weeks after the commencement of the next session of parliament," which was continued by an act of the thirty-ninth and fortieth years of his present Majesty, and amended and further continued by several subsequent acts until the twenty-fifth day of March, one thousand eight hundred and ten, shall, from and after the said twenty-fifth day of March, one thousand eight hundred and ten, be, and the same is thereby further continued until the twenty-fifth day of March, one thousand eight hundred and eleven, except so far as respects the exportation of corn, grain, or flour to Ireland ; his Majesty is thereupon pleased, by and with the advice of his privy council, to allow, and doth hereby allow, until the twenty-fifth day of March, one thousand eight hundred and eleven, the importation into any port or place of Great Britain, of any beans, called kidney or French beans, tares, lentiles, calavancies, and all other sorts of pulse ; and also bulls, cows, oxen, calves, sheep, lambs, and swine, and of beef, pork, mutton, veal, and lamb, (except salted beef and pork,) and of bacon, hams, tongues, butter, cheese, potatoes, rice, sago, sago powder, tapioca, vermicelli, millet seed, poultry, fowls, eggs, game, and sour crout, in * any British ship or vessel, or in any [* 28] other ship or vessel belonging to persons of any kingdom or state in amity with his Majesty, and navigated in any manner whatever, without payment of any duty whatsoever : provided that a due entry shall be made of all such articles as aforesaid, that shall be imported, with the proper officers of the customs at the port where the same shall be imported, under the penalties and forfeitures mentioned and referred to in the said above-recited act, passed in the thirty-ninth year of his present Majesty ; and the right honorable the lords commissioners of his Majesty's treasury are to give the necessary directions herein accordingly.

STEPH. COTTRELL.

No. 18.

At the Court at the Queen's Palace, the 2d of May, 1810 ; present, the King's most Excellent Majesty in Council.

His Majesty is pleased, by and with the advice of his privy council, to order, and it is hereby ordered, that all vessels which shall have cleared out from any port so far under the control of France or her allies, as that British vessels may not freely trade thereat, and which are employed in the whale fishery, or other fishery of any description, save as hereinafter excepted, and are return-

ing, or destined to return, either to the port from whence they cleared, or to any other port or place at which the British flag may not freely trade, shall be captured and condemned, together with their stores and cargo, as prize to the captors.

But his Majesty is pleased to except from this order, vessels employed in catching and conveying fish fresh to market, such vessels not being fitted or provided for the curing of fish.

And it is further ordered, that all vessels subject to the provisions of this order, as aforesaid, which shall have sailed on their present voyage previous to notice of this order, or reasonable time for notice thereof, shall be permitted to return to their own port without molestation, on account of any thing contained in this order; provided they shall not have continued on their

[* 29] fishery as * aforesaid more than twenty-one days (which are hereby allowed to such vessels) after due warning of this order received at sea; and the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein, as to them may respectively appertain.

W. FAWKNER.

No. 19.

At the Court at the Queen's Palace, the 2d May, 1810; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted, pursuant to the order of his Majesty's most honorable privy council, permitting the importation of cargoes consisting only of grain, meal, flour, and burr stones, from ports of France and Holland to ports of the United Kingdom:

And whereas by order of council, of the 21st February last, the said licenses were further extended for certain periods therein expressed:

And whereas it has been represented to his Majesty, that it would be expedient still further to extend the term of such of the said licenses as shall not have been used for the importation of any such cargo into this kingdom:

His Majesty, by and with the advice of his privy council, is thereupon pleased to order, and it is hereby ordered, that the term of such of the said licenses granted for the importation of cargoes consisting only of grain, meal, flour, and burr stones, as shall not have been used as aforesaid, shall be renewed and extended till the tenth day of June next, notwithstanding the same shall have actually expired; and the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of

Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

* No. 20.

[* 30]

At the Court at the Queen's Palace, the 16th of May, 1810 ; present, the King's most Excellent Majesty in Council.

WHEREAS by an act passed in the twenty-eighth year of the reign of his present Majesty, intituled " An Act for regulating the trade between the subjects of his Majesty's colonies and plantations in North America and in the West India islands, and the countries belonging to the United States of America, and between his Majesty's said subjects and the foreign islands in the West Indies," it is, amongst other things, enacted, that it shall and may be lawful for his Majesty in council, by order or orders to be issued and published from time to time, to authorize, or by warrant or warrants under his sign manual, to empower the governor of Newfoundland, for the time being, to authorize, in case of necessity, the importation into Newfoundland of bread, flour, Indian corn, and live stock, from any of the territories belonging to the said United States, for the supply of the inhabitants and fishermen of the island of Newfoundland for the then ensuing season only ; provided always, that such bread, flour, Indian corn, and live stock, so authorized to be imported into the island of Newfoundland, shall not be imported, except in conformity to such rules, regulations, and restrictions as shall be specified in such order or orders, warrant or warrants, respectively, and except by British subjects, and in British-built ships, owned by his Majesty's subjects, and navigated according to law.

And whereas it is expedient and necessary that provision be made for fully supplying the inhabitants and fishermen of the island of Newfoundland, for the ensuing season, with bread, flour, pease, Indian corn, and live stock, and also pitch, tar, and turpentine, his Majesty doth thereupon, by and with the advice of his privy council, hereby order and declare, that for the supply of the inhabitants and fishermen of the island of Newfoundland, for the ensuing season only, bread, flour, pease, Indian corn, and live stock, and also pitch, tar, and turpentine, may be imported into the said island from any of the territories belonging to the said United States, by British subjects, and in British-built ships, owned by his Majesty's subjects, and navigated according to law, * and which, within the space of nine months previous [* 31] to the time of such importation, have cleared out from some port of the United Kingdom of Great Britain and Ireland, or other his Majesty's dominions in Europe, for which purpose a license shall have been granted by the commissioners of his Majesty's customs in England or Scotland, or the commissioners of his Majesty's revenue in Ireland, or any other person or

persons who may be duly authorized in that kingdom respectively, in the manner and form hereinafter mentioned; which license shall continue and be in force for nine calendar months, from the day of the date upon which such license is respectively granted, and no longer; provided that no such license as aforesaid, granted after the thirtieth day of September next, shall be of any force or effect: And his Majesty is hereby further pleased to order, that the master, or person having the charge or command of any ship or vessel, to whom such license shall be granted, shall, upon the arrival of the said ship or vessel at the port, harbor, or place in the said island of Newfoundland, where he shall discharge such bread, flour, pease, Indian corn, live stock, pitch, tar, and turpentine, deliver up the said license to the collector, or other proper officer of the customs there, having first indorsed on the back of such license the marks, numbers, and contents of each package of bread, flour, pease, Indian corn, pitch, tar, and turpentine, and the number of live stock, under the penalty of the forfeiture in the said act mentioned; and the collector, or other proper officer of the customs at Newfoundland, is hereby enjoined and required to give a certificate to the master, or person having the charge or command of such ship or vessel, of his having received the said license, so indorsed, as before directed, and to transmit the same to the commissioners of his Majesty's customs in England or Scotland, or to the commissioners of his Majesty's revenue in Ireland, respectively, by whom such license was granted.

W. FAWKENER.

Form of License directed by the above Order.

By the commissioners for managing and causing to be levied and collected his Majesty's customs, subsidies, and other duties in [where.]

WHEREAS [name of the person,] one of his Majesty's subjects, [* 32] residing at [place where,] hath given notice to us, the * commissioners of his Majesty's customs [in Great Britain, or revenue in Ireland,] that he intends to lade at [some port of the United States of America,] and import into [some port of Newfoundland,] in the [ship's name,] being a British-built ship, [describing the tonnage and what sort of vessel,] navigated according to law, whereof [master's name] is master, bound to [where]; and it appearing by the register of the said ship the [ship's name,] whereof [master's name] is master, that the said ship [ship's name] was built at [place where,] and owned by [owner's name,] residing at [place where,] all his Majesty's British subjects, and that no foreigner, directly or indirectly, hath any share, part, or interest therein.

Now be it known that the said [person's name] hath a license to lade on board the said ship [ship's name,] at and from any port or place belonging to the United States of America, bread, flour, pease, Indian corn, and live stock, and also pitch, tar, and turpentine, the produce of the said United States, and no other article whatsoever; and to carry the said bread, flour, pease, Indian corn, live stock, pitch, tar, and turpentine, to some port or place in the island of Newfoundland; and on the arrival of the said ship at any port, harbor, or

place of discharge in Newfoundland, the master, or person having the charge or command of the said ship, is required and enjoined to deliver up the said license to the collector, or other proper officer of his Majesty's customs there, and to indorse on the back thereof the marks, numbers, and contents of each package of bread, flour, pease, Indian corn, pitch, tar, and turpentine, and the number of live stock, and shall thereupon receive a certificate thereof from the said collector, or other proper officer of the customs.

This license to continue in force for calendar months from the date hereof.

Signed by us the , at the , this day of , one thousand eight hundred and

License to import bread, flour, pease, Indian corn, live stock, pitch, tar, and turpentine, into the island of Newfoundland.

W. F.

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* No. 21.

[* 33]

Foreign-Office, May 20, 1810.

THE king has been pleased to cause it to be signified, by the most noble the Marquis of Wellesley, his Majesty's principal secretary of state for foreign affairs, to the ministers of friendly and neutral powers residing at this court, that the necessary measures have been taken by his Majesty's command, for the blockade of the port of Elsinore, and that from this time all the measures authorized by the law of nations, and the respective treaties between his Majesty and the different neutral powers, will be adopted and executed, with respect to all vessels which may attempt to violate the said blockade.

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No. 22.

At the Court at the Queen's Palace, the 16th of May, 1810; present, the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twenty-second day of November last, for prohibiting the exportation out of this kingdom, or carrying coastwise, gunpowder or salt-petre, or any sort of arms or ammunition, will expire upon the sixth day of June next: And whereas, it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, by and with the advice of his privy council, hereby order, re-

quire, prohibit, and command, that no person or persons whatsoever, (except the master-general of the ordnance for his Majesty's service,) do at any time, during the space of six months, to commence from the said sixth day of June next, presume to transport into any parts out of this kingdom, or carry coastwise, any gunpowder or saltpetre, or any sort of arms or ammunition, [* 34] or ship or lade any * gunpowder or saltpetre, or any sort of arms or ammunition, or board any ship or vessel, in order to transporting the same into any parts beyond the seas, or carrying the same coastwise without leave or permission in that behalf first obtained from his Majesty or his privy council, upon pain of incurring and suffering the respective forfeitures and penalties inflicted by an act, passed in the twenty-ninth year of his late Majesty's reign, intituled, "An Act to empower his Majesty to prohibit the exportation of saltpetre, and to enforce the law for empowering his Majesty to prohibit the exportation of gunpowder, or any sort of arms or ammunition; and also to empower his Majesty to restrain the carrying coastwise of saltpetre, gunpowder, or any sort of arms or ammunition." And the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, the lords warden of the Cinque Ports, the master-general and the rest of the principal officers of the ordnance, and his Majesty's secretary at war, are to give the necessary directions herein, as to them may respectively appertain.

W. FAWKENER.

No. 23.

Instructions. 20th June, 1810.

Our will and pleasure is, that Swedish vessels employed in the coasting trade from one port of Sweden to another port of Sweden, shall not be molested or detained under the order of the 7th of January, 1807, till further orders; but this instruction shall not construed to extend to vessels trading between the ports of Sweden and Swedish Pomerania.

By his Majesty's command,
(Signed)

R. RYDER.

* No. 24.

[* 35]

At the Court at the Queen's Palace, the 20th of June, 1810; present, the King's most excellent Majesty in Council.

WHEREAS by an act, passed in the forty-eighth year of his Majesty's reign, intituled, "An Act for further continuing, until three months after the ratification of a definitive treaty of peace, an act, made in the forty-fourth year of his present Majesty, for permitting the importation into Great Britain of hides and other articles in foreign ships," it is enacted, that an act, made in the forty-fourth year of his present Majesty, intituled, "An Act permitting, until the fifth day of May, one thousand eight hundred and five, the importation of hides, calf-skins, horns, tallow, and wool, (except cotton wool,) in foreign ships, on payment of the like duties, as if imported in British or Irish ships;" which, by an act made in the forty-fifth year of his present Majesty, was revived and further continued until the twenty-fifth day of March, one thousand eight hundred and six, and extended to goat-skins imported in foreign ships; and which was further continued by an act made in the forty-seventh year of his present Majesty, until the twenty-fifth day of March, one thousand eight hundred and eight, should be, and the same was thereby further continued until three months after the ratification of a definitive treaty of peace; and whereas, by the said acts, it is lawful for his Majesty, by his order in council, from time to time, when and as often as it may be judged expedient, to permit any hides, pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins dressed or undressed, horns, or pieces of horns, tallow, and wool, (except cotton wool,) and also goat-skins, to be imported in any foreign ship or vessel, and to be admitted to entry in any port or place in the United Kingdom, on payment of such and the like duties of customs and excise as are due and payable on the like goods when imported in any British or Irish built ship or vessel, any thing contained in any act to the contrary notwithstanding; his Majesty is thereupon pleased, by and with the advice of his privy council, and in pursuance of the powers * vested in [* 36] his Majesty by the said above-recited acts, to allow, and doth hereby allow, for the space of six months from the date of this his Majesty's order in council, the importation of hides, or pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins, dressed or undressed, horns, or pieces of horns, tallow, and wool, (except cotton wool,) and also of goat-skins, dressed or undressed, in any foreign ship or vessel, from any port from which the British flag is excluded; and that on the arrival at any port of the United Kingdom of any foreign ship or vessel, from any port from which the British flag is excluded, with any of the articles above mentioned, the said goods shall be admitted to entry on payment of the same duties of customs and excise as are due and payable on the like goods when imported in any British or Irish built ship or vessel. And the right honorable the lords commissioners of his Majesty's treasury are to give the necessary directions herein accordingly.

W. FAWKENER.

No. 25.

At the Court at the Queen's Palace, the 20th of June, 1810; present, the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twentieth day of December last, prohibiting the transporting into any parts out of this kingdom of any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, or other naval stores, will expire upon the eleventh day of July next. And, whereas, it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth, therefore, with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whosoever do any time, for the space of six months, from the said eleventh day of July next, presume to transport into any parts out of this kingdom any pig-iron, bar-iron, hemp, pitch, [* 37] tar, * rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, or do ship or lade any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, on board any ship or vessel, in order to transporting the same in any parts beyond the seas, without leave or permission first being had and obtained from his Majesty or his privy council, upon pain of incurring the forfeitures inflicted by an act passed in the thirty-third year of his Majesty's reign, intituled, "An Act to enable his Majesty to restrain the exportation of naval stores, and more effectually to prevent the exportation of saltpetre, arms, and ammunition, when prohibited by proclamation or order in council." But it is, nevertheless, his Majesty's pleasure, that nothing herein contained shall extend, or be construed to extend, to any of his Majesty's ships of war, or any other ships or vessels or boats in the service of his Majesty, or employed or freighted by his Majesty's board of ordnance, or by the commissioners of his Majesty's navy; nor to prevent any ship or vessel from taking or having on board such quantities of naval stores as may be necessary for the use of such ship or vessel during the course of her intended voyage, or by license from the Lord High Admiral of Great Britain, or the Commissioners of the Admiralty for the time being; nor to the exportation of the said several articles to Ireland, or to his Majesty's yards or garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies. Provided, that upon the exportation of any of the said articles for the purpose of trade to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to the island of Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies, the exporters of such articles do first make oath of

the true destination of the same to the places for which they shall be entered outwards, before the entry of the same shall be made, and do give full and sufficient security, by bond, (except as hereinafter excepted,) to the satisfaction of the commissioners of his Majesty's customs, to carry the said articles to the places for which they are so entered outwards, and for the purposes specified, and none other ; * and such bond shall not be cancelled or delivered up until proof be made to the satisfaction of the said commissioners, by the production, within a time to be fixed by the said commissioners, and specified in the bond, of a certificate or certificates, in such form and manner as shall be directed by the said commissioners, showing that the said articles have been all duly landed at the places for which they were entered outwards. But it is his Majesty's pleasure, nevertheless, that the following articles, namely, bar-iron, white and tarred rope, tallow or mill grease, tarpaulins for wagon-covers, pitch, tar, and turpentine, shall be permitted to be exported, upon payment of the proper duties, without bond being entered into by the merchant exporter, to any of the British plantations in the West Indies, or to any of his Majesty's settlements in South America ; provided the merchant exporter shall first verify, upon oath, that the articles so exported are intended for the use of a particular plantation or settlement, to be named in the entry outwards, and not for sale ; and that the said plantation or settlement has not before been furnished with any supply of the said articles during the same season ; and provided also, that the exportation of the said articles shall, in no case, exceed the value of fifty pounds sterling for any given plantation or settlement, whether by one or more shipments within the same season. And the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, and the lord warden of the Cinque Ports, are to give necessary directions herein as to them may respectively appertain.

W. FAWKENER.

No. 26.

At the Court at the Queen's Palace, the 27th of June, 1810 ; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted pursuant to the order of his Majesty's most honorable privy council, permitting the importation of cargoes consisting only of grain, meal, flour, and burr-stones, from ports of France and Holland, to ports of the United Kingdom :

* And whereas, by order of council of the 2d of May last, the said [* 39] licenses were further extended for certain periods therein expressed :

And whereas it has been represented to his Majesty, that it would be expedient still further to extend the term of such of the said licenses as shall not have been used for the importation of any such cargo into this kingdom :

His Majesty, by and with the advice of his privy council, is thereupon pleased

to order, and it is hereby ordered, that the term of such of the said licenses granted for the importation of cargoes consisting only of grain, meal, flour, and burr-stones, as shall not have been used as aforesaid, shall be renewed and extended till the 10th day of August next, notwithstanding the same shall have actually expired. And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the lords commissioners of the admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

No. 27.

At the Court at the Queen's Palace, the 18th of July, 1810; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted pursuant to the order of his Majesty's most honorable privy council, permitting the importation of cargoes consisting of such articles as are allowed by law to be imported (with certain exceptions stated in the said licenses) from ports situated within the Baltic; and from Archangel and other ports situated in the White Sea, which licenses will expire on the 29th of September next. And whereas it has been represented to his Majesty, that it would be expedient to extend the term of such of the said licenses as shall not have been used for the importation of any such cargo into this kingdom. His Majesty, by and with the advice of his privy council, is thereupon pleased to order, and it is hereby ordered, that the term of such of the said licenses granted for the importation of cargoes consisting of [* 40] * articles permitted by law to be imported (with the exceptions stated in such licenses) as shall not have been used as aforesaid, shall be renewed and extended till the first day of January, 1811, notwithstanding the same shall have actually expired. And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

No. 28.

Foreign Office, August 15, 1810.

THE king has been pleased to cause it to be signified by the most noble

the Marquis Wellesley, his Majesty's principal secretary of state for foreign affairs, to the ministers of friendly and neutral powers residing at this court, that the necessary measures have been taken, by his Majesty's command, for the blockade of the canal of Corfu ; and that from this time all the measures authorized by the laws of nations, and the respective treaties between his Majesty and the different neutral powers, will be adopted and executed with respect to all vessels which may attempt to violate the said blockade.

* No. 29.

[* 41]

EXTRACT of a secret letter written from Holland, on behalf of the Honorable the Court of Seventeen, in Holland, to His Excellency the Governor General in Council in India, dated Amsterdam, the 25th September, 1789. Referred to in pages 287 and 302.

WHEN reports were communicated, in the month of April last, on behalf of their high mightinesses to the Court of Seventeen, that some of the masters of the American ships had spoken something respecting the facility wherewith Batavian spices were to be had, it made a deep impression upon the said court, and spread a great doubt (the court is sorry to say) respecting the integrity of the administrators of the most tender concerns of the East India Company in India ; yet in what degree soever those impressions must have been increased on the minds of us, and of those who take those concerns at heart, you would be able to guess, as, since a short time ago, authentic informations have reached this country that important quantity of spices, and especially of cloves, were imported into America, and thence partly exported to Europe and there disposed of, by which the company is greatly undermined.

We have also received authentic information that considerable quantities of coffee, of Java, were brought by Danish-China ships in Europe, and were immediately sold.

It is undoubtful that such proceedings, when continued, must tend to accomplish the ruin of a trade, which, till this moment, did support itself with the greatest difficulty, and, as it were, is on the brink of its total destruction ; and no wonder that the attention of the sovereign, who generously advanced the money collected from the inhabitants of this country in a peculiar way, was especially directed to this point.

We see, with the greatest dissatisfaction, that by such means the unwearied endeavors of this court for the welfare of the company are crossed and rendered difficult ; and we cannot but look with terror upon the consequences which may arise herefrom, for want of a speedy and efficacious prevention.

*We, therefore, (in the absence of the Court of Seventeen,) cannot [* 42] omit representing the above case to you with the greatest speed, and through an uncommon way, and to lay before you, with the greatest zeal, the impossibility of such transactions taking place, without that in the one or

other part of the administration at Batavia fraud is committed ; and what a prejudicial influence it can be upon the mind of the sovereign, from whom only the means are to be expected for a lasting reparation of the affairs of the company, without reckoning the immense losses which, as we did observe just now, may arise therefrom for the company.

We, therefore, do command you to make a strict inquiry into the means whereby the said masters of American ships, during the last year, as in the beginning of the present one, have got spices at Batavia, and also by what way considerable quantities of Java coffee got into the hands of masters of Danish ships ; and further, in general, whether such prejudicial practices have taken place more.

We rely herein upon your zeal for the concern of the company ; and we also mean that, in such dangerous circumstances, a proof thereof may be expected with right. And we therefore trust that you will use every possible means to come to the truth, and render the case as clear as may answer to our said wishes ; for which purpose we thought proper to treat this cause secretly, and to prevent its becoming public in India, as it may be prejudicial to any inquiries which are to be made by you, as may afford means to offenders to avoid the merited punishment. On which account we also trust that you will, on the receipt hereof, keep a watchful eye upon those to whom the administration of those precious articles was trusted, as well as upon those whose duty it was to watch for the strict observation of the laws enacted against smuggling, whereof masters of strange ships are also reminded as often as they came to Batavia.

A true copy.

(Signed)

J. D. OLDENZEEL,
First Sworn Clerk.

[* 43]

* No. 30.

EXTRACT of a secret letter, written by the Court of Directors at Amsterdam to the Supreme Government at Batavia, dated the 26th April, 1790, and referred to page 303.

THIS Council of Seventeen having seriously observed that the navigation of Americans in India becomes frequent, and, apprehending bad consequences therefrom, the Dutch Company did authorize us to write to you on that point, so as we may deem it requisite.

In consequence of that authorization, we have deemed it necessary to send, for your information, a resolution of their high mightinesses of the 9th November, 1789, with its appendixes ; and we recommend you that you do discharge, in all cases, the obligations attached to decorum, which the concerns between this republic and that nation require, but that you do avoid facilitating their navigation to, or trade in India. And we do charge you that you do suggest

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to us, by the first opportunity, what the necessary means are which may be adopted to discourage them from the said navigation.

A true copy.

(Signed)

J. D. OLDENZEEL,
First Clerk.

No. 31.

EXTRACT Patrias general letter, written by the Gentlemen Directors of the East India Company in Netherland to the Government of Batavia, dated Amsterdam, 7th December, 1791 ; referred to page 302.

ALTHOUGH we are yet thinking whether the permission granted to the Americans, supercargoes of the ships The Three Sisters and The Astrea, to bring some goods for sale on shore, * should be taken as a basis, [*44] by other merchants of the said nation, to do such requests also, and thus, in our sentiment, that it will not be without some consequence, nevertheless we will pass your conduct about it, under express orders to reject in future all such requests. We are further of opinion, that the given orders concerning American ships are to all companies, settlements, and thus to Malacca too ; and we desire, also, that care should be taken that the same be carried into effect. And as we are generally of opinion that the importation of Europe or America's goods, by ships of foreign nations, is very prejudicial to the interest of the company, and the ships' men ; so we desire that, in future, our given orders concerning the Americans shall be extended to other nations also, and that care shall be taken that thereof notice be given to the men of the ships of the different nations by their arrival, for which purpose we such an order shall send to the Cape of Good Hope also.

Agrees.

(Signed)

J. D. OLDENZEEL,
F. S. Clerk.

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OF
C A S E S
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B E F O R E T H E
M O S T N O B L E A N D R I G H T H O N O R A B L E
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P R I Z E C A U S E S:

A L S O O N A P P E A L T O
T H E K I N G ' S M O S T E X C E L L E N T M A J E S T Y I N C O U N C I L.

B Y T H O M A S H A R M A N A C T O N , E s q .,
O F T H E M I D D L E T E M P L E .

E D I T E D B Y G E O R G E M I N O T ,
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V O L U M E I I .
C O M M E N C I N G W I T H T H E J U D G M E N T S I N J U N E , 1 8 0 9 .

B O S T O N :
L I T T L E , B R O W N A N D C O M P A N Y .
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IN presenting another volume of these reports to the profession, the editor feels it his duty to apologize for the imperfections of the former, and more particularly for those of the first number. That several of the cases possessed little novelty or interest, he is but too well convinced; and the adoption of a different mode in reporting those of a later date, will sufficiently prove that he was equally conscious of the defect, and anxious to amend it.

The increased value which decided cases have in later years acquired, and the total want of any attempt at reporting the very important and definitive judgments pronounced in the High Court of Appeals, proved to him irresistible inducements to attempt a task of whose difficulty he candidly admits he was not sufficiently aware; this, added to his inexperience at that time in the practice of the court, may probably, in the eyes of a liberal profession, in some degree extenuate the defects of that part of the work. The alterations made in the second number were the result of maturer experience, and the advice of a distinguished ornament of his profession and country, whose name the editor regrets he is not at liberty to mention, but of whose candor and kindness he must ever retain the most grateful remembrance. The second and third numbers contain only cases argued on appeals from the High Court of Admiralty and Vice-Admiralty Courts. The original plan of the work has been in this respect materially altered, and the editor trusts it will meet the wishes of that part of the profession more particularly connected with prize subjects. In reporting those cases, more of the argument of counsel has been given, with a view to enable the reader to ascertain for himself the particular points which may appear to have been decided in the case—a precaution the more peculiarly necessary in reporting these decisions, as in this court judgment is seldom pronounced at length, and the determination of the court is often conveyed merely in the terms of the decree. In all cases, therefore, where it might be attended with advantage, a copy or extracts from the decree have been added. The cases cited in argument have been carefully compared, and in most instances the reasons assigned in the printed cases of the appellant and respondent have been subjoined to the argument.

For the favorable reception the work has already obtained, the editor feels himself deeply indebted to the liberality of the profession, and he is not without confident expectation that the present and future numbers will be found to contain sufficiently interesting matter to induce the profession and the public to continue to these pages that indulgence and protection, to obtain which must ever be to him the subject of extreme solicitude, and an object of the utmost importance.

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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF APPEALS.

BEFORE THE MOST NOBLE AND RIGHT HONORABLE THE LORDS COMMISSIONERS OF APPEALS IN PRIZE CAUSES.

THE AFRICA, Conolly, master.

November 17, 1810.

American slave trade direct to the port of Charlestown, where the vessel would not have arrived prior to January 1, 1808, and consequently was subject to the operation of the American law, prohibiting a traffic in slaves. Condemnation.

An appeal from the sentence of the Vice-Admiralty Court of Tortola, whereby this American vessel, bound from the coast of Africa, with a large cargo of slaves, to Charlestown, and captured on the 30th of January, 1808, was restored on payment of the costs and expenses incurred by the captors in the maintenance and preservation of this property.

Dallas and *Swaby*, for the claimant, endeavored to distinguish this case from that of *The Amedie*,¹ where the ship and cargo had been condemned by their lordships; in which case it appeared the master had made a deviation from his asserted destination to an American port, and was, at the time of capture, steering for the Havana. The instructions in the present case pointed out a direct return voyage to Charlestown, or "if unable, from contrary winds, to reach Charlestown prior to the 1st of January, 1808, *to make the [*2] first American port which the master could fetch before that

¹ Vol. i. page 240.

The Africa. 2 Acton.

day, and report the ship at the nearest custom-house as bound there, but put in by stress of weather, and by so doing the prohibitory act would not attach to The Africa." It was, therefore, understood by American merchants that under such circumstances the American restrictive law would not operate upon this vessel. These instructions were punctually observed; but from a great competition amongst the slave ships on the coast, and the negroes having been attacked by the small-pox, the vessel was unable to make any American port in time, and, therefore, continued her course for Charlestown, without making any deviation. The illegality of the voyage in The Amedie originated in her destination to the Havana, a foreign colony. Here the destination was direct for America, but from unavoidable delays she did not arrive in time.

The *King's Advocate*, contended — That the mere intention of returning prior to the 1st of January was opposed to the fact of her detaining on the coast of Africa until the 16th of December preceding. The completion of the return voyage in time was, therefore, out of the reach of possibility. Neither had this vessel arrived at an American port prior to the first January, and complied with the injunctions of the owner, with a view to take her out of the operation of the American act; admitting, which is highly improbable, that such was the understanding amongst American merchants. The present master only succeeded to the command in consequence of the death of the former, which happened after the capture; and a

material witness, the surgeon, had stated that the former [*3] master, when overlooking the ship's papers in *company with the lieutenant of the capturing vessel, had said, "This is the chart I have to carry me to New Providence," that previous thereto he had never heard where the ship was bound, neither did he know what she was going there for, but apprehended it was to wait for or obtain orders respecting the said ship from the owners. The present master had said, that should The Africa not be admitted to an entry at Charlestown, he believed he should have been ordered by the owner to proceed to the Havana, to dispose of the slaves there. The steward also had sworn he had heard the late master tell the capturing brig commander, that "he did not know; but he should put into New Providence, or something to that effect." Thus the whole transaction had an air of mystery about it, for which there were no doubt most substantial reasons; and although the greater part of the secret had perished with the former master, it would be very easy for the court to determine upon the motives of such concealment on the part of the owners.

The Nancy. 2 Acton.

COURT.

SIR W. GRANT. What are these unavoidable delays mentioned by the claimant's counsel? Is there any mention made of contrary winds, or other impediments to the completion of this voyage within the time limited by the American act, which were not within the control of the party? Certainly this cannot be considered a case which was ever intended by the legislature to be within the reach of indulgence.

SENTENCE.

Pronounced for the captor's appeal, and condemned the ship and cargo, to the sole use of his Majesty, his heirs and successors.

*NANCY, Viall, master.

[*4]

November 17, 1810.

American slave trade. Deviation from asserted destination for America to St. Thomas, attempted to be justified by sickness of crew and mutiny of slaves. Concealment of enemy's property in slaves on board, though subsequently acknowledged. Condemnation.

A DISTINCTION was made between this and the preceding case by counsel (Dallas); first, that the former appeared to be decided upon the ground that there had not been sufficient time allowed by the master to render her return to America probable previous to the expiration of the period limited by the American act; whereas, in this case, the return voyage from Senegal commenced the 30th September, 1807, providing ample time for her return in conformity with the requisition of the American law; secondly, that, through the sickness of her crew, one of whom expired on the passage, (many more being ill at the time of the capture,) and the apprehensions entertained from the tumultuous disposition of the slaves, who had thrice risen upon the crew, and had been with difficulty subdued, the master was induced to alter his intended destination to Charlestown, and bear away for the nearest port in the West Indies. On the 30th October he discovered the high lands of Spanish town, and considering St. Thomas's most convenient, in the attempt to make that island was captured. The voyage, therefore, had been commenced; and, but for these unfortunate occurrences, would have been completed, conformably with the American law.

The Anne. 2 Acton.

King's Advocate and *Stephen*, objected — That this was in fact a trade from any enemy's port to a port not his own, and, therefore, the master had attempted a trade which, ever since the year 1794, had been declared illegal. To the representation of the mer-

[*5] chants of *South Carolina to the American government, re-

questing that time might be given them to perfect engagements already entered into in this traffic, since if these vessels should not be able to arrive in time in America they could not, as the law stood with respect to the foreign slave trade, go to dispose of their cargoes at a foreign market, an answer was returned, that it was intended no encouragement whatever should be given to the trade, and, could it constitutionally have been done, it long since should have been stopped altogether; but that at all events, shippers should be left to undertake at their peril any voyages where it was, suspected there would be scarcely sufficient time to return before the period appointed by the act. It was remarkable that the master, in making for St. Thomas, must have crossed the trade winds, and passed the latitude of St. Bartholomew and Barbadoes. This was evidently a voyage undertaken to procure the best market he could. In the preparatory examination the master fraudulently had stated the whole cargo to belong to his American owners, but the day after, apprehensive of detection, he corrected himself by admitting that ten slaves had been shipped on freight by a Frenchman. Further proof could not, therefore, be now admitted to distinguish these from the remainder, but the whole property should be considered liable to confiscation.

SENTENCE.

Pronounced against the appeal, and condemned the ship and cargo.

[*6]

*ANNE, Dennison, master.

November 17, 1810.

Slave trade by Americans to a foreign port interdicted by the act of Congress, 1794, prohibiting the foreign slave trade. A claimant for property captured in this trade, notwithstanding the capture was made previous to the British Slave Trade Abolition Act, bound to show that he is protected in such trade by the municipal law of his own country. Application for claimant's costs refused.

THIS was a case of an American ship with a cargo of slaves bound from the coast of Africa (where she had touched at several settle-

The Anne. 2 Acton.

ments of different European nations, for the purpose of obtaining slaves) to Monte Video, in South America. In attempting to make this port she was captured, on the 6th January, 1807, and carried for adjudication to the Cape of Good Hope. In the court below, three affidavits were introduced to prove that Monte Video, which the captor's case asserted was at that time blockaded, was not in a state of regular blockade, but that various vessels had been permitted by Admiral Stirling's squadron there cruising, to go up the river Plata; two were added to prove that the settlement of Cape Mount, from whence this cargo was in part or principally procured, was a British factory. The judge had decreed the ship and cargo to be restored on payment of captor's expenses, from which sentence both parties appealed. The case was now argued upon the liability of this vessel to forfeiture under the American law of 1794, prohibiting the foreign slave trade.

Dallas, for the claim. The reason assigned in the claimant's case for restitution, with costs and damages against the captor, is, that "the ship and cargo most clearly appeared to belong to the American citizen for whom they are claimed, and were engaged in lawful trade; and there was no just reason for the capture and detention."

* In deciding this cause it will be only necessary to advert [* 7] to the facts of the case with reference to the American act of 1794, prohibiting a trade in slaves by Americans to foreign settlements. This voyage appears to have commenced in 1806, and concluded by the capture of the vessel in sight of port, on the 7th January, 1807. By these dates it will appear that she had returned nearly a year prior to the operation of the general restrictive law of America, which did not take place until 1808, and nearly three months before the British law¹ for abolishing the slave trade. The question, therefore, for the decision of the court will be, whether the principle recognized by the judgment delivered in the case of *The Amedie*² is to be construed as having a retrospective effect, or in other words, will a British court of prize, acting upon this principle, compel a neutral claimant, whose property has been captured previous to the abolition of the slave trade by the British legislature, to show that he acted under the sanction or protection of the laws of his own country. For obvious reasons it is presumed the court will not authorize such a construction of the judgment alluded to. The

¹ Passed 25th March, 1807, prohibiting the African slave trade from the 1st of May, 1807.

² Vol. i. p. 240.

The Anne. 2 Acton.

liability of any vessel to detention and condemnation in our courts originating with the abolition law of Great Britain, a vessel captured prior to the passing of that law, as in the present instance, cannot be considered as subject to its operation, notwithstanding the adjudication had not taken place even after the passing of that act by the British parliament.

[*8] * The *King's Advocate*, for the captor. In estimating how far the judgment delivered in the case of *The Amedie* may affect the present case, much depends on the terms used by the court in delivering that judgment. It is scarcely necessary to inquire, can our act of parliament affect the positive law of another country? It is absurd to suppose it can. Whatever were the effects and operation of the American act of 1794, they were conclusive as to American merchants. Our act of parliament could not affect that which was independent in itself, and complete long prior to the act of our legislature. There can, therefore, be no question, whether the interdiction was complete. It must have been so originally, without relevancy to our statute. The only mode in which it can be supposed that the Americans might be relieved by our act of parliament, is by supposing notice of the prohibition was thereby intended, and was indeed actually given. The answer to this is, that such notice could only be intended for British subjects. It was not intended, nor could it ever have been considered as a notice to foreigners. They would not have been bound to observe it. The only notice they would have been bound to attend to was that of their own legislature which appears to have been in the present instance equally a notice *de jure* as *de facto*. It would have been held a notice *de jure* on the ground of publication, and *de facto*, as abundant time appears to have elapsed for general communication.

The reasons for condemnation were:—1st, Because the vessel was, at the time of capture, prosecuting a voyage to the colony of the enemy, in violation of the prohibitory laws of America

[*9] for the abolition of the slave trade, * and is not, therefore, within the provisions of the order of the 24th of June, 1803.

2dly, Because, independent of that prohibitory law, the voyage commencing at Elmina, a Dutch settlement on the coast of Africa, and destined to Monte Video, was illegal.

3dly, Because that destination was pursued in violation of the blockade of Monte Video then existing.

Dallas, in reply, observed, as it had been argued that the ground

The Anne. 2 Acton.

upon which the illegality of this transaction attached was solely in consequence of the previous regulations of America, and as this capture had taken place previous to the British act; supposing this vessel had been brought before the court for adjudication prior to the 25th of March, 1807, when our act passed, could the court consistently have pronounced the vessel and cargo prize? or could those regulations of America have then been adverted to with effect? If no law of ours had been enacted prior to that period there never could have existed a necessity, on the part of the neutral, to show he was within the protection of his own law; which appeared, by the judgment in the case of The Amedie, to be that alone which our courts of prize have a right to require of a claimant in similar circumstances. The case before the court was in every respect the same as that stated, except that this vessel had not been brought up for adjudication until the British law had passed; but unless it were intended to give that law a retrospective and *ex post facto* effect, the determination of the court must be the same as if the adjudication had taken place previous to the passing of the British law.

*JUDGMENT.

[*10]

SIR W. GRANT. By the judgment in the case of The Amedie, we pronounced the slave trade can have no legitimate existence, except under the particular municipal law of that country to which the claimant belongs. It was then considered, and very explicitly declared, that the trade was altogether unlawful, except so far as it was in the power of the neutral to show this trade was protected by the law of the neutral state. This protection was required to be satisfactorily shown in that case, which not having been complied with, we pronounced sentence of condemnation. Here, also, the claimant must necessarily do the same, and produce the proofs of his protection before he can obtain restitution.

SENTENCE.

Pronounced for the appeal of the captor, reversed the sentence of the court below, decreeing restitution of the ship and cargo upon payment of the captor's expenses, and condemned the ship and cargo.

An application was made for the claimant's expenses, which was also refused.

[*11] * THE SHIP CARPENTER, Meyer, master.

January 24, 1810.

Brimstone under a false destination from Sicily to Copenhagen but actually to Marseilles, not contraband under the particular circumstances of this case. Ship restored. Not to be inferred that it cannot be so in any case.

THIS vessel, with a cargo consisting of brimstone, under American colors, bound from Palma, in Sicily, to Marseilles, (but ostensibly to Copenhagen,) was captured and condemned at Malta as lawful prize. An appeal was prosecuted by the master as to the ship and cargo; but after appearance entered, notice was given by the appellant's proctor, that they had not considered their appeal as applying to the cargo, although by error it had been inserted in the inhibition.

The *King's Advocate*, for the captor. The decision in the court below proceeded upon the principle that the present cargo must be considered, under the circumstances of its destination, as completely within the meaning of the term contraband. The question as to this species of this cargo has never here been formally decided, perhaps never even discussed. The conduct of the parties engaged in the transaction, and the mode of carrying on this speculation, are matter of sufficient curiosity and interest to arrest the attention of the court. The master states he sailed in ballast to several ports of Sicily previous to his arrival at Palma, where his cargo of raw brimstone was shipped for account of Abraham Gibbs, of Palermo, consul of the United States, and actually destined to Marseilles; but finding it impossible to clear out from thence for a French port, an ostensible destination for Copenhagen was adopted. The cargo was consigned to order, and, had the ship arrived at Marseilles, some person

[*12] would have * applied for the cargo. At the time of the capture there was on board a bill of lading describing the whole cargo as for the sole account and risk of the master, paying no freight, being owners' property, in which a blank was left for the consignee's name.

Also a certificate to the following effect. "I, Charles Rowley, Esq., commanding his Majesty's ships in the island of Sicily, certify that I do not consider raw brimstone an article of contraband; and were I to visit a neutral vessel laden with it, I should not detain her. Palermo, 27th April, 1807. Signed C. Rowley." To which was annexed another certificate under the consular seal of the United States, stating that the above was a faithful copy of Captain

The Ship Carpenter. 2 Acton.

Rowley's opinion, certified under his own hand, the original being in the possession of the subscriber, Abraham Gibbs, consul. Under these circumstances, and prepared with these specious instruments, the parties considered the fraud possible, if not practicable, and the ship sailed for Marseilles, which port she was actually taken in endeavoring to enter. Facts such as these make it impossible to consider this particular case as a question to be decided merely upon the strict principle, whether the cargo was contraband or not. The fallacy and deceit practised in this transaction, and to which the agent for the owner was throughout a party, must in themselves lead the court to pronounce sentence on the vessel were the article in dispute merely one *promiscui usus*. But in adverting to the different speculative writers upon this subject, the article of brimstone will be found to have been included upon general principle as a description of contraband, and sometimes enumerated as such in different treaties, by name. Where, however, the article itself appears to be peculiarly adapted for purposes [*13] of war, it does not seem necessary that it should have been distinctly pointed out by name as contraband; and had it never entered in terms into any of the different treaties between the various powers of Europe, or other parts of the globe, its inherent character and use would necessarily lead to the inference that it must be included within the meaning and intent of the supplemental words usually inserted subsequently, whenever any enumeration has taken place, comprising all other implements and materials of war generally, those general terms being intended to include all articles in their nature adapted for belligerent purposes, although not particularly enumerated. Reasoning from analogy, between this and other articles of a contraband nature, we must arrive at the same conclusion. Bynkershook,¹ treating of contraband articles, says that salt-petre has been distinctly enumerated as such in many treaties, although omitted in others. Yet upon the nature of this article there cannot exist a doubt. It appears to have been an article which attracted the attention of this country at a very early period, and we find it accordingly included as such in an ordinance of Charles the First. If, therefore, an article of at least equal notoriety as contraband of war has been sometimes omitted, in the specific enumeration of some treaties, and, notwithstanding such omission, it has, nevertheless, been always considered to be comprised within the meaning of the general terms concluding the description of such articles, it is

¹ Quest. Jur. Pub. lib. i. cap. x.

The Ship Carpenter. 2 Acton.

equally fair to infer that the article of sulphur, which is the next material ingredient in the composition of gunpowder, [*14] *though not always enumerated amongst contraband articles, is no less so on account of such omission, and must be, in like manner, considered to be included within the general terms of such treaties. And in this conclusion we are borne out by facts; for although it is contended that this article of sulphur has not been enumerated in the treaty between this country and America,¹ yet the enumeration of a treaty is by no means to be considered complete, and comprising every thing in its nature contraband, but mentions merely, *exempli gratia*, cannon, saltpetre, and other implements of war generally. In the treaty between America and Holland, made in 1782, and in that between Great Britain and Russia, in 1776, sulphur is distinctly enumerated amongst others. Hence it appears, that although this article has not been introduced into the enumeration of the treaty between Great Britain and America, as we find it in others, we must attribute the omission to a conviction that its general character was perfectly well known. Independently, however, of the particularization of express treaties, this question stands on the general principles of contraband, and must be decided in conformity to decisions of this and other courts of competent jurisdiction. In compliance with these principles, you have determined that tallow bound to Brest, and rosin to a port of naval equipment, are contraband. If this vessel carried but a small proportion of brimstone on board, probably the court would, were there no circumstances of fraud in the case, be disposed to consider the case favorably; but where the whole cargo consists of brimstone [*15] stone, no room is left for favorable *construction. An article *promiscui usus* may, perhaps, be permitted to take its character from the port to which it is sent, and the degree of good faith observable in the transaction; but where there can be no doubt of the intention with which this cargo was shipped; where the parties themselves had, at least, their doubts as to its nature; where fraud characterized the inception and conduct of the voyage; where the article itself has been expressly enumerated in some treaties as contraband, and must be considered of too dangerous a nature ever to be purposely omitted whenever enumeration has taken place; the court, without departing from the principles which have guided them on former similar occasions, cannot but consider this present ship-

¹ Definitive treaty of peace between Great Britain and America, signed at Paris, 3d September, 1783.

The Ship Carpenter. 2 Acton.

ment contraband, and affecting the vessel with the penalty of confiscation.

Reason for condemnation — Because the vessel was carrying contraband to a port of the enemy, under false papers.

Arnold and Stephen, for the claim. What has been introduced into the argument of the King's Advocate, from the works of speculative writers, is far too vague to lead the court to affirm the sentence of condemnation of this vessel. And if this part of the captor's case fail, it will most probably prove decisive of their case, as it has been admitted there is not any decision upon record respecting the nature of this particular article. Neither Bynkershoek or Vattel have introduced it into their enumeration of contraband articles. The first concludes his enumeration by the general terms: “*Materia per se bello apta* ;” words which can never be supposed to include a raw article, indifferently used in various other manufactures as well as that of gunpowder. No ^{*}doubt the reason [*16] of his omitting brimstone and including saltpetre in his enumeration, was, simply, that the one was found to be expressly prohibited in several conventions, whilst the other was passed over in silence. Indeed but a very scanty proportion, not one twentieth part of the brimstone imported, is used for making powder, compared with the quantity used in the different manufactures of this and other countries. Its general nature and use is described in the Encyclopedia as remarkably serviceable in manufactures for extracting the color out of wool and silk, prior to its being dyed red. It enters into the composition of vitriol, and is consumed in vast quantities in the woollen and silk manufactures of England and France. Its being used in the making of gunpowder is merely incidentally mentioned. Its nature and use cannot, by any analogy, be confounded with that of saltpetre, which is almost exclusively used to make gunpowder. Whenever enumeration takes place in treaties, it is clearly for the purpose of avoiding all possibility of dispute. The omission, therefore, cannot bear a second interpretation. If it has been enumerated in one or more treaties, as in that with Russia, it must be inferred that it is so considered contraband on convention, and not upon principle. As, therefore, it is not originally contraband, not *per se* fitted for war, but has in latter times derived a contraband character from particular conventions, American merchants are to be guided by the treaty entered into between Great Britain and the United States, in which this is not enumerated. Where the court might reasonably have entertained doubts of the character and purpose of a shipment, as in the case of *The Nostra Signora de*

The Ship Carpenter. 2 Acton.

Begona,¹ it was considered that rosin to the port of Nantes, being a mercantile port, was not excluded from the favorable construction [* 17] applicable to other articles *accepitis usus*, and restitution was decreed. The arguments founded on the character of the port of actual destination are defective in this, that Marseilles is not a port of military equipment, though certainly not very far distant from Toulon, but a port of considerable commerce, in the neighborhood of which the silk manufacture, in which so much brimstone is consumed, is carried on to a great extent.

It is too much to expect that a false destination, in the present state of the commerce of Europe, when scarcely any trade can be carried on, even by ourselves, but through the medium of false papers, will not only imply *mala fides* in the transaction, but also give a criminal property to the material itself. The asserted destination to Copenhagen was not a falsehood *eo intuitu*, to deceive British cruisers. The master swears the reason he cleared out for Copenhagen was, that it was impossible to clear out for a French port from Sicily; that the cargo was consigned to order, and, had the ship arrived, some person at Marseilles would have applied for it; that he was described as the owner in the bills of lading, as Mr. Gibbs, the real owner, was apprehensive his name might endanger the property from French or Russian privateers. On approaching the port of Marseilles, the destination for Copenhagen was scratched out, and Marseilles substituted. The object of this artifice is satisfactorily made out in proof, which was in part justifiably resorted to, in compliance with a custom-house regulation in Sicily, and subsequently continued to protect the property from enemy's cruisers.

As the cargo was known to be one upon which a doubt might possibly arise, as to its strict character, if searched by a cruiser, [* 18] it appears the real owner endeavored * to ascertain, for his direction, the opinion of a British naval officer upon the subject, which, happening to favor his project, a copy was despatched amongst the ship's papers, for the purpose of showing in what light it had been considered by one of his Majesty's commanders.

BY THE COURT.

SIR W. SCOTT. It will be material to consider by whom is this certified. Mr. Gibbs alone states Captain Rowley to have appeared before him, and given such a deposition. The certificate itself was, therefore, a document extremely desirable, considering the doubtful

¹ 5 Rob. Rep. 57.

The Ship Carpenter. 2 Acton.

circumstances under which this shipment was made. This statement cannot but be considered as very liable to objection.

Thus it cannot be collected that there was an intention to deceive our cruisers existing in the mind of the proprietor. Any doubts the master, perhaps, might have entertained, were probably removed by the answer received, which is sufficiently explicit, and must have come with peculiar weight from a British commander. He, at least, must be considered innocent in intention, and should recover the ship for his owners, whose property it would be rigorous in the extreme to condemn; being residents in America, altogether unacquainted with the transaction, while the master appears not to have entertained any conviction of the cargo's being of a contraband nature. Under these circumstances, it would not be too much to expect that, had his Majesty's Advocate even succeeded in proving this cargo contraband, the ship should be restored to the proprietors.

Reason for restitution — Because the vessel was fully proved to belong to the American citizens for whom it was claimed, and was engaged in lawful trade.

**King's Advocate*, in reply, observed, that in treaties, it [* 19] would be found enumeration generally took place by way of elucidating the meaning of preceding classification. Bynker-shook¹ had said that saltpetre had often been mentioned in treaties and conventions as contraband where powder itself had been omitted. Yet no doubt existed about the nature of the one or the other. Of brimstone, as little doubt could be entertained, particularly when the large quantity was considered, two entire cargoes being shipped by this same Mr. Gibbs, at the same time, and for this port, so close in the neighborhood of Toulon, notoriously a naval depot. In the present times, when all things had undergone so striking a change by the violent measures of the enemy, the definition of contraband used by old writers, ought to be abandoned, or, at least, the terms *per se* omitted. There could be little doubt that both Mr. Gibbs and the master

¹ The passage before and here alluded to, is to be found in his *Quæst. Jur. Pub. lib. i.*, c. x.: *De nitro salpetre magis dubitari posset, quia per se materiem belli non præstat, et tamen salpetre continetur omnibus fere, quos indicavi catalogis rerum prohibitarum, nam ex nitro maxime fit pulvis bellicus, præcipuus nunc belli fomes. Quin animad-verti, nitrum sœpe exprimi, omissa mentione pulveris bellici, sœpe etiam ea addita. Ubi omissa est, ipsum nitrum succedit loco pulveris bellici, ubi addita, pro synonymis habentur, nisi nitrum ob præcipuum ejus in bello usum, excepérint gentes a materia per se bello non aptis. Quæst. Jur. Pub. lib. i., c. x.*

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were perfectly well aware of the purposes for which this commodity was intended in France. And by submitting a case for the opinion of Captain Rowley, it seemed they only wished to know, was he as as wise as themselves; if not, they supposed there was a good chance of effecting their illegal purpose. Unfortunately for the owners of the ship, no favorable distinction could be drawn between the conduct of their agent and their own.

[* 20] * JUDGMENT.

SIR WILLIAM GRANT. In this case, we admit the claim for the ship. By this decision, it is not to be understood that brimstone cannot be contraband in any case, but merely, that it is not contraband under the circumstances of this case.

SENTENCE.

Pronounced for the appeal, and reversed the sentence appealed from; therein retained the principal cause, admitted the claim for the ship, but pronounced no freight or expenses to be due to the neutral master.

THE TOPAZ, Nicoll, master.

February 9, 1811.

Resistance to the exercise of the right of visitation and search.

An armed American vessel, having carried on the forced trade on the Spanish main, and, while under a British flag, seized some vessels for the purpose of ransoming part of the crew which had been detained on shore, &c., on arriving off Macao, attempts to resist a British cruiser in the exercise of the right of visitation and search, captured, after a desperate resistance.

Condemnation.

AN armed American schooner, condemned in the Vice-Admiralty Court, of Bombay, for resistance to the exercise of the right of search, by his Majesty's ship Diana, in Macao Roads, in China.

This schooner having been equipped for, and employed in, the forced trade on the Spanish main, arrived at Macao, where an attempt was made to search her, by the boats of The Diana, in consequence of information given by some of her crew, who had entered on board The Diana, that she had committed various acts of piracy under a British flag, during her cruise upon the Spanish main. A desperate resistance was made by the master and crew, in which the

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former was killed, several of both parties wounded, and the vessel captured. An appeal from a sentence of condemnation was prosecuted, on the presumption, that as the right of search had been previously submitted to peaceably, the search, in the present instance, had been attempted vexatiously in an improper manner, and also in an improper place, namely, within * the limits of the [* 21] neutral Portuguese territory or roadstead of Macao.

King's Advocate, for the captors. The circumstances developed in the preparatory examinations of this case, fully justify the captor in the exercise of the right of search, which right the claimant now attempts to invalidate, by a long train of evidence, introduced to prove that the captured vessel was situated within the territorial limits of the Portuguese settlement of Macao. The question of territory has, however, been most attentively considered by the court below, which, from its proximity to the scene of action, must have had more satisfactory means of ascertaining the validity of this objection, than any we can obtain. The judge appears to have most judiciously referred the question respecting the local situation of this vessel, with the ship's papers, logs, &c., to the decision of three respectable nautical men, under the superintendence of the registrar ; the substance of their report is, that upon examination it appears that the soundings of Macao reach upwards of ten miles from the town ; that the term, Macao road, is quite undefined, meaning only the anchorage ground between Macao and that range of islands of which Samcock and Tycock are the principal, which is open anchorage ; that from the log-book of The Topaz, it appears that The Topaz lay in four and a half fathom water ; that soundings of four and a half fathoms do not come nearer Macao than about four miles, nor nearer the Nine Islands, which are desert rocks, than three miles ; that, upon the whole, from the evidence, it would appear, that the position of the schooner was about five miles from Macao, five and a half miles from Cabretto Point, four * and a half miles from a point forming the [* 22] opposite side of the entrance to the Typa, and at least three miles from the Nine Islands ; that upon the 6th day of August, 1807, the brig Diana lay with Macao town bearing north-west by west four or five miles, and the Nine Islands north by east half east ; that at this time The Diana must have been about two miles and a quarter from Cabretto Point, the nearest land ; that next day, being the 7th August, The Topaz came to anchor north-east by north, three and a half miles from The Diana ; that in the afternoon of that day The Diana shifted her berth to the north-east, but how far the log-book does not specify, nor can the reporters discover by other means ; that

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this motion carried her still farther from the nearest shore, and nearer to The Topaz ; in this situation, she was moored at daylight in the morning of the 8th ; in the afternoon the boats went to board The Topaz, and eventually took possession of her ; the schooner Topaz having just got under weigh when taken, was then carried towards The Diana, and at five in the afternoon brought to anchor with Macao town north-west by north, The Diana bearing east north-east, and Cabretto point south by west ; that, upon the whole, they report that The Diana, on the 6th, and part of the 7th of August, was about two miles and a quarter from Cabretto Point, and in the evening of the 7th moved farther from that point and from the land in a north-easterly direction, but find it impossible to report how much, having no data.

By a subsequent report, upon inspecting some additional surveys of the harbor of Macao, and the river Typa, made by order of the East India Company, they, in all respects, confirm the former [* 23] report, except that * the said survey would make The Diana somewhat less than a half mile nearer to Cabretto Point before she shifted her berth on the afternoon of the 7th, and thus make her to have been somewhat less than two miles from Cabretto, but from her afterwards shifting her station, find it impossible to state her actual place at the time of fitting out the boats.

There appears, in the appellant's case, nothing satisfactory to overturn the inference to which these reports must necessarily lead, except the vague testimony of some sailors on board, who speak with much diversity as to her situation at the time of capture ; one stating it to be two miles from the shore, and seven from Macao ; another, one mile from the shore, and town of Macao ; a third, two and half from shore, and four from Macao. From such evidence, especially when given by part of the captured vessel's crew, little can be safely inferred. The difficulty of ascertaining distances at sea with any precision by the eye, also renders it expedient to prefer charts, logs, and soundings, with the calculations of experienced seamen, to any evidence deduced from sight, which is extremely liable to deception. The inference, therefore, to be drawn from these reports is, that this vessel was totally out of the protection of neutral territory, and, therefore, liable to search ; nor was her distance materially altered by the unavailing attempt it appears she made to clear The Diana's boats, and get into the Typa. She had only hoisted sail when the boats boarded.

Dismissing this part of the case with observing, that no remonstrance was then or has been since made to the detention and seizure of this vessel by the Portuguese governor, which affords a strong pre-

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sumption that no violation of territory was even suspected, it * will appear that the design and conduct of this voyage, [* 24] or piratical cruise, (as it may be termed,) imperatively called upon the commander of his Majesty's brig to investigate the complaints which had reached him through the medium of some of the Topaz's crew, which had entered on board the brig. From the preparatory examinations, it appears the vessel sailed from Baltimore for the north-west coast and a market, well armed, and provided with French, English, American, and other colors. Her cargo consisted of linen, dimities, muslins, &c. The master was enjoined by instructions from one of the owners, Mr. Taylor, "to avoid speaking with, and not voluntarily to throw himself into the way of other vessels; to resist if attacked by any other vessel whatever, and to fight his own way." The master had also repeatedly said he would suffer none to board while a man was alive. The conduct of the voyage perfectly accorded with the nature of these preparations and instructions. She directed her course to the Spanish main, where she committed various piratical acts, boarding Spanish vessels, forcing them to contribute to her wants, taking possession of them in order to procure her papers, which, in one instance, had been detained when sent on shore, or with a view to procure the release of part of her crew, which had been seized on account of previous enormities committed on the coast. At Monte Christo, a landing was made to plunder the town, which was repulsed, with the loss of twelve of the crew. The master described his vessel frequently as an English privateer, and English colors were hoisted. During her expedition to the Spanish main, it is stated, she obtained by these illegal means, and the sale of one third of her cargo, a very valuable return cargo, consisting * of valuable metals, plate, and specie.¹ It is submitted, [* 25] by the reasons in the case,

1st. That "there is no sufficient proof that the property of the cargo belonged lawfully to the claimants;

And 2dly, That the ship and cargo are subject to condemnation for resistance to search, by which many persons have been wounded, and other deplorable consequences have ensued."

Adams and Stephen, for the claimants. Notwithstanding the first reason assigned in the captor's case, no substantial objection has been offered as to the property of this vessel and cargo, in opposition

¹ 65 tons of copper, 65,000 dollars, 146 lbs. silver plate, 825 lbs. silver in pegs, and some gold.

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to the concurrent affidavits of the asserted owners and several of the crew. This part, therefore, of the case may be taken as proved. The remaining question is one of the most delicate nature, and upon your decision thereon depends the fate of an extremely valuable vessel and cargo. What has been urged upon the propriety of the intervention on the part of the Portuguese government on a claim of territory, is to us, and to the merits of this case, immaterial. It is one thing to attempt to invalidate a capture on a claim of territory, and another to say that, geographically speaking, the search was attempted within the neutral territory. The remissness or neglect of the neutral government cannot deprive a claimant of his rights, however such a government may be disposed to abandon its own. This vessel must necessarily be considered to be in the harbor of Macao, upon the faith of

the protection afforded by the neutral territory, a protection [*26] founded *on the justest principles, and long sanctioned by the law of nations.

This vessel appears to have been engaged in what is commonly denominated the forced trade, which is not unusually carried on with similar circumstances of deceit and violence, because it is almost impossible it could be otherwise. For acts like these the parties therein engaged cannot, morally speaking, justify themselves; but it cannot be doubted that this trade, and its accompanying circumstances, are by most nations considered politically justifiable. In the present circumstances of European commerce, the most glaring deceit is daily practiced to facilitate the introduction of British manufactures. This, though of a much later date, must still be considered perfectly justifiable in a political point of view.

The right of visitation and search has ever been considered by neutrals as most invidious, and has been repeatedly the source of remonstrance and contention. But the exercise of this harsh right upon one neutral, within the territory and protection of another, is a grievance not to be endured. All authorities of earlier date have uniformly maintained the principle; and Mr. Jenkinson, whose opinions are very familiar to later times, pursuing the reasonings upon this subject in his work entitled "Conduct of Great Britain in respect to Neutral Nations,"¹ states as an incontrovertible truth, "within the precincts of the dominion of any government you are not at liberty to search the ships of any country." A most important object, therefore, with all nations must be the inviolability of the protection of their territory. The road of Macao is formed by the river Typa emptying itself into a narrow arm of the sea, on one side inclosed by

¹ Liverpool's Collection of Treaties, vol. i. p. 6.

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the main land, on the other by the range called the Nine Islands, something like Spithead, several parts of which [*27] also are full three miles distance from the contiguous lands; yet no one ever supposed Great Britain would endure that foreign vessels should be visited and searched by others while lying within such a road. Three witnesses on board allege her distance from the Portuguese territory was within three miles at farthest, and all on board agree she was within the territory of the settlement when the search was last attempted. To get rid of this positive swearing, reports are obtained from some ships' captains, to whom the vessel's papers, logs, &c., have been referred; which cannot but be considered much more vague and conjectural than any evidence afforded by persons upon the spot, who were eye-witnesses of the whole transaction. Yet even these reports establish the claimant's case. The Nine Islands must be considered part of the territory of Macao, as it forms part of the harbor or roads which are there said to be very indefinable, extending even ten miles from the town. The report adds, the prize was at anchor within five miles of Macao, that is higher up the river than the capturing vessel, therefore, within the roads, and the exercise of this right cannot be considered legal. The instructions were not found on board; but it is proved the master was required by them not to molest but avoid all other vessels, but to resist in case of attack, as was perfectly justifiable. The whole management of this unfortunate affair has been extremely objectionable. If suspicions were excited, as The Topaz lay in a land-locked place, and the town was provided with a fort and troops, had an application been made to the governor, representing the circumstances, and he had considered it necessary, the search might have taken place without bloodshed, or the violation of territory. But the *captor [*28] does not avail himself of the constituted authorities, but takes the whole affair into his own hands; pays first one visit, and then another, as appears by the petition of appeal, both which were peaceably submitted to; a third is attempted by the commander of the brig in person, with the brig's boats well manned and armed. This third visit assuming the appearance of an hostile boarding, the master was bound by his instructions to resist; but first endeavored, by making sail up the river, to get clear of the boats. This certainly is not the mode of excising the right of visitation and search which courts in this country will be induced to uphold, upon a mere statement that some sailors had communicated information respecting these alleged piratical transactions on the Spanish main. The evidence of these deserters was extremely suspicious; and this gone-by transaction, however properly it might have been a subject for representation

from the Spanish to the American government, was not one which called for the unsought interference of a British officer in the East Indies. If these depredations ever had been carried on partly under our flag, it was then properly a subject of representation from the British to the American government only, and by no means within the scope of his official duty. But another reason is furnished by one of these sailors, who states, that the last time the brig's boats went for wages due to some of his comrades, who had entered on board the brig. In this he is corroborated by the evidence of the surgeon of The Topaz, who adds, the master had refused to pay an arrear of wages due to one of them. British ships of war, it is well known, exercise this privilege of enforcing the payment of wages owing by the masters of British vessels to seamen entering [*29] *on board his Majesty's ships, but by what right they may be privileged to act as collectors, and enforce the payment of such alleged debts by neutral masters, remains yet to be explained. If the right is not distinctly proved, resistance to it cannot fairly be visited by penal consequences, and the confiscation of this very valuable property. It is remarkable, too, that one witness states the brig's boats first fired on The Topaz's crew who were endeavoring to make their escape. The whole tenor of the evidence might lead to a suspicion that these violent means were resorted to in order to provoke a resistance which might in some sort justify the capture. The claimant appears to be in that situation that he may require the captor to propound the whole of the right by virtue of which he acted. We deny what is presumed by the captor, that the exercise of this right was legal. Upon this presumption alone depends the whole of the captor's case. The burden of proof rests, therefore, with him; but the fair presumption is against the party. The weakness of his case, and the doubtful evidence adduced, must throw proportionable strength into the scale with the claimant. If we can only bring the question to a state of doubt, that doubt should prevail in our favor. If still the court should be of opinion enough has been shown by the captor to substantiate part of his case, and that more accurate information as to the territorial limits of the settlement would be desirable, further proof may be required; the best mode of obtaining, which would probably be through the medium of the custom-house of Macao, to show how far the territory of the settlement is considered by the Portuguese government to extend.

[*30] *King's Advocate, in reply, contended — That it was perfect competent to any British officer to detain even forcibly this vessel, on receiving intelligence that she had for a long time been

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engaged in a sort of piratical cruise, during which she had frequently assumed and thereby degraded the British flag. The resistance made originated in consciousness of guilt; and it was remarkable, one of the witnesses on board stated, that the master had avowed his intention to dispose of the vessel as a privateer at the Isle of France, which resolution was attributed by another to the apprehensions entertained lest the transactions on the South American coast might have been represented to the American government. In the case of The Washington, a vessel fitted out for a slave voyage, sailing from a port in this country, and amenable to the laws enacted relative to the slave trade, it was proved resistance had been made, and this court had condemned the vessel.¹ If the objection here

*taken on the question of territory were available, and no [* 31] right of search allowed to the extent here contended for, it could never be known how far the belligerent's right might be safely exercised with respect to the seizure or detention of neutral vessels under suspicious circumstances. The first visit was merely for the purpose, it appeared, of examining the protections of the crew, not to search the vessel. This made no material alteration in the case. It had been erroneously assumed, that the right of visitation and search was confined to the high seas. This doctrine had been directly contradicted by their lordships' own rules. With respect to the proposed proof from Macao, it could not but be objectionable, as such could only with propriety be received in support of a claim of territory, which had never been made.

¹ Washington, Adams, Lords, June 3, 1809. A case of an American vessel bound from Liverpool to the coast of Africa on a slaving voyage, for account of several British proprietors, and from thence to the port of Charlestown for delivery. In the river of Congo she was boarded by The Prince of Orange, private British ship of war, and sent to Surinam for adjudication, for having on board contraband of war, which it appeared she had obtained from a British ship while on the coast of Africa. On the voyage to Surinam she was again taken possession of by the boats of his Majesty's ship Epervier, but on the captors proceeding to adjudication the ship and cargo were restored. An appeal was prosecuted before the lords commissioners, where the captors availed themselves of a fresh ground for condemnation, namely, that after she had been captured and sent towards a port for adjudication, the master and crew had attempted to rescue the vessel, and had actually taken measures for arming themselves, and compelling the prize-master and crew to quit the prize in an open boat. It appeared in evidence that the master had endeavored to obtain the key of the arm-chest for the purpose of arming the crew, and but for a discovery of their design, the rescue would have been attempted. Upon the ground of attempted rescue and un-neutral conduct, their lordships, therefore, it would appear, pronounced for the appeal, and condemned the ship and cargo as lawful prize to the captors.

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Stephen distinguished the resistance made from that proved in The Washington; which was a deliberate conspiracy to retake the ship after capture, and the crew were very fortunately prevented from turning the prize-master and his crew adrift into the Atlantic in an open boat.

The *King's Advocate* submitted — That the consequences of an attempt to rescue a prize, and an actual resistance to the exercise of a legal belligerent right were equally fatal.

SENTENCE — 2d May.

Pronounced against the appeal, and affirmed the sentence of the court below, condemning the ship and cargo.

[* 32] * GOEDE HOOP, Van Thuysen, master.

March 21, 1811.

Removal of neutral or British property from islands or settlements ceded to a foreign state which became subsequently hostile.

A vessel under a Dutch flag, with a Dutch pass, and bound from the Cape of Good Hope to St. Helena, America, Amsterdam, or London, as the supercargo should consider most eligible, but originally purchased by a merchant residing at the Cape, for the account of British merchants desirous of removing their property to their own country, by means of which purchase, by a domiciled Dutch merchant, the vessel acquired all the advantages of Dutch character. Ship condemned.

Essentially necessary to show the intention of the shippers to be that of absolute removal of themselves and their effects, previous to obtaining restitution of property shipped on board the above vessel. Restitution of part of her cargo, where such intention had been carried into effect.

In the Vice-Admiralty Court of Barbadoes this ship and cargo, under Dutch colors, pass, and sea-brief, bound from the Cape of Good Hope to the West Indies, America, or Amsterdam, as the supercargo should consider most conducive to the interest of the proprietors, and claimed as the property of several persons by birth British subjects, but latterly resident at the Cape of Good Hope, whilst in the possession of the Dutch, had been condemned under the following circumstances.

The claimant in the original cause, Mr. John Carey, a British subject, in his affidavit, stated that, having himself considerable property at the Cape of Good Hope, he was, in July, 1799, deputed by several

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British subjects, merchants in this country, as their attorney, to transact their respective business, and recover various demands, claims, and debts due to them by different persons residing at the Cape of Good Hope, during the period the said settlement was in possession of the British forces, previous to the peace preceding.¹ The claimant went out to the Cape, then in possession of Great Britain, and continued there, transacting business for himself and others, until the settlement was ceded to the Batavian republic; and having then collected considerable property, with which he was desirous of returning to England, (the exportation of specie from thence having been prohibited, * and it being impossible to obtain good bills on English merchants,) he, jointly with Mr. Joseph Bray, William T. Venables, and Leith Alexander Davidson, British merchants then at the Cape, who were also desirous of removing part of their property to Great Britain, purchased the ship Goede Hoop for the sum of 1,000 guineas from the present master, also a British subject, and entered into an agreement, stipulating that they conjointly should provide a cargo, amounting in value to 30,000 rixdollars, for which cargo and ship they should provide in the following proportions: Mr. Carey in two fifths, Messrs. Bray and Venables in two fifths, and Mr. Davidson in one fifth part thereof. The vessel, with her cargo, was to proceed under the conduct of Mr. Carey, as supercargo to St. Helena, there to dispose of part of her cargo, and take in East India goods, and thence to sail for America, Hamburg, Amsterdam, or England, as the supercargo should think most advisable for the interest of the several proprietors, and the voyage to be terminated, the vessel disposed of, and the accounts made up, on the vessel's arriving at Amsterdam or England. For this agency the respective parties were to pay Mr. Carey certain commissions. By the examinations and affidavit of Mr. Carey, it appeared that the parties interested in this ship and cargo considered "it would be materially advantageous, as it was then a time of apparent peace between Great Britain and Holland, to vend the exports that should be procured at the Cape of Good Hope in a Dutch settlement, where there was an absolute certainty of disposing of the said ship to greater advantage than in England; and, therefore, procured a Mr. Amyott, of the firm of Amyott, * Simpson, & Co., of London, nominally to make [*34] the said purchase for them." He (Mr. Amyott) having solely for commercial purposes, (as Mr. Carey stated,) and to be of

¹ Signed at Amiens, 1802.

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service to his own state, as well as his own affairs, resided for about the last three years at the Cape, "where he had obtained some degree of consideration, and was considered as a burgher;" by which means the vessel was entitled to carry a Dutch flag, an object of considerable importance, as she had formerly been a prize condemned in India, had a pass extending only to the Indian Ocean, and was, therefore, liable to interruption by British cruisers in the proposed voyage. The purchase, however, by Mr. Amyott and bill of sale were, as stated by Mr. Carey and the master, altogether nominal, no money having been paid by him to the former owner of the vessel, the real and true sale being made by Mr. Van Thuyzen to Messrs. Carey, Bray, Venables, and Davidson. Amongst the ship's papers there was a power, executed by said Amyott, to dispose of the vessel, which was, Mr. Carey adds, provided merely to prevent any difficulty that might arise upon the subsequent intended sale of this vessel in Europe. Mr. Carey adds, that fearing "the term of three years, which it was by the treaty of Amiens stipulated should be granted to all individuals of the respective nations which had been previous to that time at war, in order to collect or remove their debts and effects from the ceded countries or settlements, would prove insufficient for accomplishing the extensive affairs of his constituents; and being known to the commissary general of the states at the Cape, he was induced (it being then a period of peace) to procure a burgher's brief, or license, to go from or return to the [*35] Cape at any *further time he might find necessary; which was, as he stated, the sole purpose and inducement he then had in applying for the same." The whole property on board, with the exception of one cask of ironmongery, the property of Mr. Amyott, was provided by the aforesaid parties to the above agreement. The claimant in the court below, in addition to the facts here stated, suggested, in his answer to the captor's libel, that the ship and cargo claimed was protected by his Majesty's order in council of the 1st of June, 1803; providing that all vessels under the flag of the Batavian republic, coming from any of the colonies late in the possession of his Majesty, but restored by the treaty of peace to the Batavian republic, which, together with the goods on board, were the property of his Majesty's subjects, should be delivered to the British owners, or their agents, upon affidavit that such vessel and goods were their property at the time of sailing and detention, and upon sufficient bail being given to abide the adjudication.¹ Among the ship's papers were letters of instruction, from

¹ These are the words of the answer itself. It, however, does not appear any order

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Davidson & Co., and Bray, Venables, & Co., directing Mr. Carey to pay the proceeds of the brig and cargo as soon as realized, to their agents in London; a bill of sale of the brig, by Van Thuyse[n] to Amyott, and Dutch license to Amyott, as owner; a receipt by Amyott for 1,050*l.*, * from Bray, Venables, Carey, and [* 36] Davidson, in full for the brig. The judge pronounced sentence of condemnation on the ship and cargo, 4th February, 1804.

On an appeal to the lords commissioners, 7th August, 1807, the reasons adduced on condemnation, by the counsel for the captors, were: "Because the vessel was navigating in a Dutch character, and the asserted owners of ship and cargo are to be considered as Dutchmen; 2dly. Because the claim is not established by the evidence, with respect to the property." That for restitution was: "Because the evidence proves the property of the ship and cargo to belong to British subjects. And the ship's being sent out under the Dutch flag and pass is accounted for by the situation of the owners and their property, and, under such circumstances, should not prevent their obtaining restitution of it." Their lordships affirmed the sentence condemning the ship, pronounced for the appeal respecting that part of the cargo claimed on behalf of John Carey and Alexander Leith Davidson, and decreed the same to be restored; but directed further proof as to the national character of Bray and Venables. An affidavit of Joseph Bray, sworn at Boston, May, 1808, was brought in, stating that, on going to the Cape, in 1797, when the place was possessed by Great Britain, he entered into partnership with Mr. Venables, and they carried on trade there under the firm of Bray & Venables. On the cession of the Cape to the Dutch, he was anxious to remove his property, and became a party to the agreement respecting this vessel and cargo, the proportion of which claimed for him (one fifth) was actually his property. That he continued at the Cape, but being still anxious to remit his property from the Cape of Good Hope, * which he had hitherto [* 37] been unable to do, on account of the absolute impossibility of procuring good bills of any description, and because the revival of war was then known at the Cape, (in order to make arrangements for remitting his said property as securely as possible from seizure or capture by his Majesty's enemies,) found himself obliged, in the year 1804, to come to Boston, North America, whence, in the same year,

of this description issued on the 1st of June. It is most probable the order alluded to was no other than the instruction of the 2d of July, 1808, issued for the protection of British property coming from countries and islands ceded to the Dutch by the late peace, and sailing before they had received notice of the renewal of hostilities.

The Two Brothers. 2 Acton.

he returned to the Cape, where the exigencies of his affairs compelled him to remain till the 1st or 2d day of May, 1805, when he again took his departure from thence in the ship Eliza, for Boston, North America, at which place he arrived in the month of July following, and where he has constantly resided since. And he further made oath, that he had never been domiciled in the territory of any of his Majesty's enemies, or of their allies.

SENTENCE.

The court decreed restitution of the property claimed on behalf of the claimant, Mr. Joseph Bray.

The property claimed for Mr. Venables had been condemned for deficiency in the further proof introduced as to his national character, on the 18th May, 1809.

[* 38] * THE Two BROTHERS, Seabury, master.

(Appeal from Ceylon.)

March 21, 1811.

A voyage, as asserted, from Marseilles to Tranquebar, but actually to the Isle of France, under pretext of distress, which was not sufficiently established, held to be a voyage originally destined from Marseilles to the Isle of France, and, as such, not entitled to a more favorable construction than that applied to the coasting trade of the enemy under false papers.

THIS vessel, under American colors, sailing from Marseilles, and bound ostensibly to Tranquebar, but captured attempting to enter the Isle of France, was, with her cargo, consisting of provisions, fruit, liquors, &c., condemned as "carrying on an illicit trade between Marseilles, a port of the French republic, and the Isle of France, a colony of the said republic; and further, the said cargo being the property of and belonging to persons inhabiting within the territories of the said republic."

King's Advocate, for the captor, stated the facts of the case. The voyage commenced at Baltimore, from whence the vessel sailed to Leghorn, disposed of a cargo of coffee and sugar, and sailed in ballast to Marseilles. By the original letter of instructions, the master had

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orders to return in ballast direct to Baltimore ; a subsequent letter directs him to proceed to Marseilles, procure a suitable cargo, agreeably to directions forwarded by the owners to the consignee at Leghorn, and clear out for Tranquebar, and should he there meet with a market suitable to his expectations, a return cargo of coffee was to be purchased at Batavia, Moka, or the Isle of France. In compliance with these orders, the vessel performed her voyage to Leghorn and Marseilles, and in the prosecution of the asserted voyage to Tranquebar, was captured, bearing * up for the Isle of [* 39] France, under the pretence of sickness among the crew, a deficiency of water, and the badness of the spars aloft. These pretexts appear to have little more than a shadow of foundation. That in some degree they existed is not disputed ; two of the crew died, one continued sick. There are entries in the log stating that two casks of water had leaked out ; that there were only forty gallons on board, twenty of which were contained in a cask in which several rats had been drowned ; that both top-sail yards had sprung aloft ; and having no wood on board, the master resolved to steer for the Isle of France. As the master was perfectly aware of the extreme danger he incurred by entering that port, it is impossible to account for his running this extraordinary risk, but by concluding that the actual motive for such a deviation was the great advantages he expected to derive from the sale of such a cargo as he had on board, consisting of all the luxuries of France. But it is ascertained by the evidence of two officers of the capturing vessel, that upon examining the casks alluded to, the water was found drinkable ; and there were in the casks upwards of sixty gallons. Another circumstance of a very suspicious nature is, that, by the admission of the master, it appears he never had been at Tranquebar before ; and yet was not consigned to, or furnished with instructions to any merchants there ; he was, according to the letter of instructions, to endeavor to obtain a market for the cargo. The suspicions which are thus excited, with respect to the actual intended destination of this vessel, have been all confirmed by the discovery of several packages of letters addressed to various persons * residing in the Isle of France [* 40] and Bourbon, all which were artfully concealed in the bottom of a case containing umbrellas. One of these is directed to Mr. Buchanan, American consul at this island, whom the master admits to be brother of one of his owners. These facts must be decisive of the false destination of this vessel. The voyage appears to have originated in the idea of deriving considerable advantages from interfering in the trade between our enemy and the colony. Indeed, a trade so circumstanced as this, may be considered very fairly in the same

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light as carrying on the coasting trade of the enemy. Geographically speaking, it may be considered an abuse of the term, but in point of law, it must be liable to all the objections attendant on the interference in the enemy's coasting trade, and hence, equally subject to the penalty of confiscation of ship and cargo. The house at Leghorn to whom the vessel had been consigned, appears, from the master's evidence, to have had a more than ordinary interest in this intended voyage to the enemy's colonies; this is conspicuous from the style of the correspondence as to the lading and consignment of this vessel when she should arrive at Marseilles. Purviance, one of the partners of this house, is admitted to have been formerly clerk in the house of a part owner of this vessel. To him, therefore, the consignment had been made very confidentially, and by him again made to a house at Marseilles, with which it does not appear these owners had previously any dealings. These admissions strongly point to an enemy's interest in the property taken in at Marseilles, which is attempted to be

[* 41] *supported by papers and attestations stating the whole to be neutral property.

Reasons for condemnation.

1st. Because the voyage being from Marseilles to the Isle of France, under a colorable destination to Tranquebar, it is to be considered on the same footing as the coasting trade of the enemy, which would, under such circumstances, subject the property to condemnation.

2d. Because the proofs of property in such a transaction must be held to be insufficient, and the parties are not entitled to the benefit of further proof.

Dallas and Stothard, for the claimants and appellants, contended the property was satisfactorily proved by parol evidence, and most unexceptionable documents, to be exclusively in the appellants. No present connection whatever in trade was proved to exist between Purviance, at Leghorn, or Buchanan, at the Isle of France, and the owners. The property was, therefore, unimpeached. The destination was open and avowed, from the commencement of the voyage even from America. In cases of intended concealment of destination, some slight instances of incautiousness, or, at least, the inconsistencies of different witnesses, were scarcely ever wanting to point out the actual destination. But here, no such traces of fraud could be discovered. The vessel was detected avowedly sailing for the Isle of France, as appeared by her log, which also stated her reason for such deviation to be a sickness of the crew, and a want of water [* 42] and wood. *On all hands it has been admitted, there was but a very miserable supply of water, and whether amount-

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ing to sixty or twenty gallons, it must be considered altogether inadequate for the remainder of the voyage. As to the legality or illegality of entering the Isle France under these circumstances, two questions naturally arose ; the first, whether a mere touching there for the purpose of refreshment, be illegal ? and *non constat*, that any thing more was intended or necessary ; and, secondly, whether an intention to trade there would affect this vessel and cargo with the penalty of confiscation ? Upon this latter question, there appeared to be tolerable strong authority in the decision of the court in the case of The Patapsco,¹ where the court held, that the captors had not established that part of his case which asserted, that a trade from Batavia to the Isle of France, was illegal. It had been there attempted to be shown that these places were of a strict colonial nature ; but this part of their case having failed, the court decreed restitution. This case appeared to be strongly assimilated in its circumstances to that of The Patapsco, and several others which then followed the decision in that case. What had been urged as to the culpability of these parties, on the ground of its being an interference in the coasting trade, appeared to be a confounding of the meaning of the very simplest terms. To suppose an island in the Indian ocean a part of the *terra firma* of France, was absurd ; yet nothing less could possibly serve the captor's case, and convert this deviation into the coasting trade of this country.

* JUDGMENT.

[*43]

SIR W. SCOTT. This was a case of an American ship sailing with papers purporting a voyage from the port of Marseilles to that of Tranquebar ; but our view of the circumstances of this case, is that the original and intended destination of the vessel was from Marseilles to the Isle of France ; and that the distress set up as an excuse for deviating to the Isle of France, is merely fictitious. We are, therefore, of opinion that a transaction of this nature is not entitled to a more favorable rule than that usually applied to the coasting trade of the enemy, when carried on by a neutral under false papers ; and, therefore, decree condemnation of the property.

SENTENCE.

Pronounced against the appeal, affirmed the sentence of the court below, condemning the ship and cargo as lawful prize to the captors.

¹ 1 vol. 270.

The Cora. 2 Acton.

[*44]

* THE CORA, Van Allen, master.

May 2, 1811.

Case of a vessel with a cargo taken in at one port of the island of Java and proceeding to another, with an intention (as asserted) to procure from the latter place a clearance, and proceed to America with such cargo, held to be a trading within the order 7th January, 1807. The presumption being, that she was going to the latter port for the purpose of discharge. Ship and cargo condemned.

An appeal from the sentence of the Vice-Admiralty Court at Bombay, condemning this American ship, and a return cargo of coffee, taken on board at Samarang, in the island of Java, the proceeds of her outward cargo, consisting of provisions, wine, oil, olives, &c., laden at New York, and disposed of at Batavia, where she took in some Sapan wood for dunnage, from which port she had sailed without a regular clearance for Samarang, but by means of an order to the guard-ship stationed off that port, giving her a permission to pass. On returning from Samarang with this cargo to Batavia, for the purpose (as asserted) of obtaining a clearance for America, and proceeding with her cargo to New York, the capture took place. The sentence of the court below proceeded upon the illegality of this description of trade by neutrals.¹

[*45] * King's Advocate and the Attorney-General, for the captor. Upon several different and distinct grounds, this property appears liable to condemnation, any of which will probably be sufficient, if established, to support the captor's case. On the 12th of March, 1807, she sailed from New York with a cargo of provisions for Batavia, with instructions to the master and supercargo to deliver the cargo to a Mr. Law, supercargo of another American vessel, belonging to the claimants, which it was supposed would previously have arrived at Batavia. This Mr. Law was intrusted with the sole management of the vessel and cargo by the owners, who appear to have calculated upon his wishing the vessel to make a voyage to

¹ In the Vice-Admiralty Court at Bombay, March 2, 1808, the Hon. Sir James Mackintosh, pronounced the said brig, with the goods, &c., therein laden, "were rightly and duly taken and seized; the same being captured while in the prosecution of an unlawful voyage from Samarang (a port belonging to the Batavian republic, enemies of his Majesty, and shut to neutrals in time of peace) to Batavia; and also for carrying on trade between two ports belonging to the enemy, contrary to his Majesty's instructions, and as such, or otherwise, ought to be accounted and reputed liable and subject to confiscation, &c."

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some other port or ports in India. In conformity with their wishes, the vessel, after discharging part of her cargo at Batavia, where she arrived in June following, sailed to Samarang, another Dutch settlement in Java, where the remainder of her cargo of provisions was sold, and a cargo of coffee taken on board, with which she sailed for Batavia. Upon these facts alone, therefore, this voyage is clearly within the meaning of his Majesty's order in council, 7th January, 1807, "prohibiting a trade from one port to another, both which ports shall belong to or be in the possession of France or her allies, or shall be so far under their control, as that British vessel may not freely trade thereat." The account given of this voyage from Batavia to Samarang, and the motives which are assigned for undertaking it, are of the most suspicious nature. Notwithstanding the vessel had a supercargo on board, she was consigned to another at Batavia, with an unlimited permission to engage the vessel in any scheme he might consider eligible. Hitherto the Dutch [*46] government had, with an extreme jealousy, prohibited all intercourse with these settlements by foreign merchants, except through the medium of Batavia alone, which being the seat of government, it would be regulated according to its wishes and political interests. *Guarda costas* were stationed along the island to prevent any such trade. The coasting trade was thereby exclusively confined to the vessels of these settlements, which, with the armed vessels formerly stationed off the coast, have, since the commencement of the war, been all captured or destroyed. The difficulties which the Dutch government encountered in carrying on the trade between the different neighboring Dutch settlements and Batavia, rendered it necessary the restrictive policy which had obtained during periods of peace should be relaxed, and neutrals were, therefore, (as in the present instance,) permitted to be the carriers of those commodities, which it was otherwise impracticable to remove to the general market for exportation. Upon this ground, also, the captors are entitled to a sentence of condemnation, as this vessel appears to have illegally engaged in a trade which, during peace, was prohibited to neutrals; and your lordships have repeatedly decided, that a neutral state shall not avail itself of any temporary relaxation of colonial restriction, uniformly enforced during peace, to facilitate its commercial communications during war, or evade the rights of a belligerent. This is, therefore, a trade to a port from which, during peace, an American would have been excluded. Besides which, there are circumstances in the transaction which directly point out that the government of Batavia itself had an interest, if not the [*47] entire property in this shipment. By the letters of instruction

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to the supercargo, he was empowered, "if he could obtain any advantageous employment for the brig, to accept it." The vessel sailed for Samarang by the special permission of the government, and did not enter or clear out from the ports of Samarang or Batavia in the usual manner. The outward cargo, of which it is said the present is the proceeds, amounted in value to about \$9,000, whilst the invoice of the return cargo states its value at \$28,000 and upwards. These circumstances, taken collectively, necessarily induce a suspicion of the property being in part or altogether that of the enemy, especially as it appears the same parties have disposed of another of their vessels at Samarang. The probability is, that the sale or transfer of this vessel took place at Batavia, from whence she proceeded, colorably, as an American, to Samarang, and was returning to discharge her cargo at Batavia. From the unlimited confidence reposed in Mr. Law's discretion, this might all have been effected without any possibility of obtaining further evidence of the transaction. The order of the 7th of January is strictly applicable, and the voyage must be primarily considered to be from the port of shipment to the port of destination. Sometimes that, however, may be dismissed, but not without the most unequivocal proof that such was not the port of ultimate and actual destination. In the case of *The Neutrality*, Gardner,¹ argued here, which was a case of a voyage from a port in the Mediterranean, touching at Alicante, but with an alleged destination to America, it became a serious consideration whether, upon

[*48] *the change of port, the property would not be affected.

Restoration, however, was decreed, it having been clearly ascertained, that no trade to the port of Alicante had been in contemplation; but at the same time an intimation was given by the court, that a touching at such a port would in some cases affect the property of the ship.

Dallas and *Arnold*, for the claimants. The doubts now entertained with respect to the property, formed no part of this case in the court below, nor can they here, unless the oaths of the master and supercargo, proved by various documents, all supported on oath, be set aside upon mere conjecture. The order of 7th January applies to a "trade" between ports both in possession of France or her allies, &c. To bring this vessel within the order, the fact of trading must be either established or proved to have been in contemplation. The capture prevented an actual trading, and the oral testimony of the

¹ Lords, Sept. 26, 1808.

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master and supercargo, together with the letter of instructions from Mr. Law, at Batavia, to the master, distinctly state the destination of the vessel was ultimately to America, merely calling at Batavia on his return from Samarang.¹ * By this letter [*49] it appears Mr. Gerard, the supercargo, had deposited funds with the company for a cargo of coffee, and agreed, to save time, that the vessel should proceed to Samarang, and there take in as much as could be obtained, the deficiency, if any, to be completed on her return to Batavia. This fully accounts for the vessel's not regularly clearing out from Batavia. The arrangements were all made with a view to despatch, and Mr. Law's superior information induced his owners to intrust him with the superintendence of all their concerns; the supercargo of this ship being comparatively unacquainted with the trade of those places. All the evidence rebuts the imputed intention to trade between these ports. Many cases have come before this board, of American vessels arriving at one port in Europe, and finding no sales, have, without taking in any additional cargo there, proceeded to a second, and such voyages have not been considered a trading, or within the restrictions of the order. So many of this description of cases have occurred, that we have ceased to argue the question. When the former adjudication was made, a decision had taken place in the Vice-Admiralty Court of Malta, that the mere sailing from one port to another in the possession of the enemy brought a vessel within the *meaning of [*50] the order, which has since been exploded.

BY THE COURT.

SIR W. SCOTT. Is not this vessel, by your admission going from

¹ Captain Van Allen.

“ Dear Sir,

Batavia, 28th August.

“ On your arrival at Samarang I presume you will find there Mr. Gerard, supercargo of your brig, who, you know, left here on the 18th for that place, having deposited here funds with the company sufficient to load the brig with coffee, agreeing to take it to Samarang, in order to make despatch in being ready to proceed to New York, and save laying a long time at this place. The company, not knowing whether there may be enough coffee on hand at Samarang to load the brig, have given an order, which you carry, to receive all on hand, or a full load; they agree, however, if there is not sufficient, that you are not to delay for it, but on your return here you shall immediately receive enough to complete your load, and be able to proceed to New York; and as Mr. Gerard will wish to stop here to complete the business relative to the sale of his cargo, it may be of no disadvantage should you not get full entirely there.

“ I am your's, sincerely,
“ W. LAW.”

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Samarang to Batavia? The point now in controversy is, must not this trade be considered the coasting trade of these settlements.

King's Advocate. There was even a part of a cargo, consisting of Sappan wood, put on board at Batavia prior to her sailing to Samarang.

But which, it appears, never was sold at Samarang; therefore, between these two ports no trade was carried on. This constituted part of her return cargo for the American market, for which the residue, consisting of coffee, was peculiarly adapted. In cases of suspicion the evidence in the cause must be tried by its probability. This description of cargo had been particularly recommended by the owners as the most advantageous for their market. Upon suggestion by the captors that Samarang was a close port, the judge below had directed an inquiry; the captors adduced evidence, that although Batavia was open, Samarang was a close port. But whether a close or open port makes no difference as to the applicability of this order, which makes no distinction between ports closed or open to other nations in time of peace. But the decision proceeded upon the assumption that this was a trading to Batavia, and, therefore, illegal. That question had not been decided, as it has since been at this board, in the case of the Patapsco,¹ in which case it was [*51] held by your lordships such trade was not illegal. *The presumption, however, is not that a ship going from one port to another (especially in these seas, and upon long voyages) is going for purposes of trade.

COURT.

SIR JOHN NICHOLL. I do not recollect any case of a vessel, with goods laden in an enemy's port, and going to another in the possession of the enemy, which has not been considered as a trading.

SIR WILLIAM SCOTT. It certainly is the presumption she is going for purposes of trade, but this may be repelled by evidence.

It should be observed, that although this coffee was taken on board at Samarang, it appears to have been laden at Batavia. This very cargo would have been laden at Batavia had it not been for the

¹ Vol. i. p. 270.

The Cora. 2 Acton.

anxiety of the master to return to America. A special permission was, therefore, obtained to save time. It was necessary to return to Batavia to clear out to America, which it does not appear she could have done at Samarang. The same construction has been put upon the trading at Matanzas and the Havanna which have here, by your lordships, been held to be the same trade.

King's Advocate, in reply. The general presumption of law is strongly against the claimant, and although the order mentions trading in one part of it, it was never meant to imply extensive commercial concerns alone. Indeed, in the subsequent terms of the order there is something equivocal, which, if not mildly construed in the first instance, would probably have led to an interdiction of *all communication whatever between such ports. It is a [*52] restriction in the nature of a blockade. Is there, then, to be found a case of breach of blockade, where the court, applying a general order by general rules of presumption, has stooped to accommodate its determination to particular avowed objects on the part of the claimant? This would be, indeed, a dangerous practice. Hence in all blockade cases, we find this court has decidedly set its face against pleas founded solely upon intention as far too liable to abuse. The *dictum* of the court in the case of *The Neutrality* was most positive, although only a *dictum*, which is not always to be considered binding, and that particular case was excepted, not by probability or presumption of intention, but by the fact that she had gone in, and without attempting to trade there, proceeded on her way to America. A case occurred here of a vessel¹ from the 'Spanish Main, with a cargo of cocoa, bound, by her papers, to a port in America, but actual captured going into Curacao. The court considered it was not competent in this equivocal state to admit a plea of intention that she was going in for the sole purpose of landing a passenger, the master's brother. Applying, therefore, these principles to the facts of the case, there is enough to show this communication was illicit. These parties, it is also to be observed, have sold one ship to the Dutch government; there is, therefore, even the less probability of her actual intention to return. Another ground of condemnation is disclosed in the admission of the supercargo, that in their trip to Samarang they had carried out some Dutch gentlemen, amongst others Mr. Cowell, who is said by the master to have had rank in the Dutch navy, and, in fact, has in that character *taken pri- [*53]

¹ George, Pullinger, Lords, November 17, 1809.

The Diana. 2 Acton.

soners some persons now in court. A conduct highly illegal, and such communication must be considered at least tantamount to trading. You have always held proof of this kind conclusive, and only capable of being rebutted by positive facts.

The court took time to deliberate.

JUDGMENT.—July 25, 1811.

SIR W. SCOTT. This was a case of an American vessel, which, after disposing of her outward cargo at Batavia, proceeded from thence to Samarang, another Dutch port in the island of Java, where she took in a cargo of coffee, with which she was proceeding back to Batavia, when the capture took place. The presumption is, therefore, that she was going to Batavia for the purpose of discharging her cargo, which is not rebutted by the evidence in the cause. The trade must, therefore, be considered as part of the coasting trade of the enemy; and the ship and cargo, in conformity with his Majesty's order in council, liable to confiscation.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below, condemning the ship and cargo.

[* 54]

* THE DIANA, Ledesma, master.

May 16, 1811.

License trade from Cuba to New Providence. The voyage not being completed within the time limited by the license, owing to detention by the enemy's privateers, from a suspicion of having a British license on board, and the vessel subsequently deviating from the regular course to obtain provisions. Ship and cargo restored, notwithstanding it appeared the date of the license had been altered, though without the master's knowledge.

THIS was a case of a British schooner which had been captured by the enemy, and after condemnation in the island of Cuba, purchased for account of British merchants residing in New Providence, and laden with sugar, bark, &c., for account of the master and another Spanish subject.

A license was procured for this vessel by the master from the Spanish government at Cuba, to carry on the coasting trade there. Another license was also obtained from the governor of the Bahama

The Diana. 2 Acton.

Islands, to pass with certain articles therein enumerated, from the port of St. Jago de Cuba to Nassau, in the island of New Providence, which was to be in force for sixty days from the 24th day of March, 1807. The latter being carefully concealed on board by the former master, Pedro Escoval, in a seroon of bark. The vessel cleared out from St. Jago about the latter end of May for Nuevitas, and two days after was captured by a French privateer, and carried back to St. Jago under suspicion of having a British license on board; the captors being unable to substantiate this fact, the vessel was liberated, and a certificate of the same granted to the master. After being detained for two months, the vessel again sailed actually for Nassau, and experiencing much calm weather put into Baracoa, and afterwards into Holguin, to obtain provisions, but without trading at either places. On her arrival in port she was, with her cargo, seized and condemned as a droit of admiralty, *by the judge [* 55] of the Vice-Admiralty Court of New Providence, who pronounced her not to have been protected by the terms of the license, the date of which, it appeared on minute examination, had been altered from March to May, with an allowance, however, of the claimant's expenses; from which sentence an appeal was now prosecuted on the part of the claimant.

The *King's Advocate*, for the right of his Majesty, contended, that the license having been granted for a limited period, which had expired previous to the vessel's departure from Cuba, the design of the voyage should have been altogether abandoned, or, at least, deferred until another had been procured of a later date, the vessel having ceased to be within the protection of the terms of the license. The reasons assigned in the case for condemnation, were,

- 1st. "Because the purchase of the vessel in the enemy's country, by British subjects, was illegal."
- 2d. "Because fraud appears to have been used in the alteration of the license, and it is not applicable to the transaction in question."

Jenner, for the claimant, admitted the date of the license had been altered, but totally without the knowledge, privity or consent of the present master; the license remaining concealed until his arrival in port, when it was given up to the foreign searcher who first discovered the alteration which had been made. The claimant's attestation satisfactorily proved these facts. The deviation to Baracoa and Holguin was within the intent of the license, which provided that *the vessel should not deviate from the regular course [* 56] between the ports mentioned therein, without sufficient cause

The Elizabeth. 2 Acton.

being assigned by the master for such a deviation. The failure of provisions on board this vessel was a sufficient and satisfactory reason alone for such a deviation. For the following reasons annexed to the claimant's case, he, therefore, submitted the vessel and cargo should be restored.

1st. "Because the said vessel had arrived in the harbor of New Providence, under the protection of a license granted by the governor of the Bahama islands, and delivered her cargo, and duly completed her voyage, previous to the seizure thereof."

2d. "Because the transaction in question was duly conducted according to the tenor and effect of the license granted in that behalf, and no fraud whatever is imputable to the parties engaged in it."

SENTENCE.

Pronounced for the appeal, reversed the sentence appealed from, pronounced the said ship and cargo to be protected by the terms of the license on board; and decree the same to be restored to the claimants, for the use of the owners and proprietors thereof.

[* 57]

* ELIZABETH, Soestadt, master.

May 16, 1811.

Decree of this court final. Not its practice to rescind its decrees.¹
Application to rescind upon a suggestion of the neutral character of a house asserting an interest in property formerly condemned for insufficiency in the proofs of property, rejected.

THIS was an application to rescind a decree, pronounced in March, 1810, whereby their lordships condemned part of this cargo, claimed on behalf of certain Austrian merchants formerly residing at Trieste, to the crown.

Lushington, for the claimant, stated that the sentence of condemnation, formerly passed by the court, had been acquiesced in on an understanding, that on suggesting satisfactory proof of the national character of Messrs. Rioul & Smidt, the claimants of this property, who had been formerly merchants residing at Trieste, this decree

¹ [The Monarch, 1 W. Rob. 21.]

The Elizabeth. 2 Acton.

should be rescinded. This, he stated, had been acceded to by his Majesty's Advocate, counsel for the captors; and it was then settled, that an application to the court, under such circumstances, should meet with no opposition on the part of the captor. The proof he had to offer consisted of affidavits of the most satisfactory nature, and most conclusive, as well with respect to the facts attested, as to the unexceptionable nature of the testimony adduced to prove these facts.

The witnesses were persons of the highest rank and consideration under the Austrian government. It appeared, by the treaty of Vienna, a provision had been made in favor of such persons as should be disposed to retire from the ceded countries or cities, and an indulgence of some years had been granted to parties to remove from such places, and, amongst others, from Trieste, without prejudice to their national character. In the case of landholders, the time was extended

* to six years. In compliance with the terms of this treaty, [* 58] the claimants, Messrs. Rioull & Smidt, had prepared to remove their property from Trieste, upon its surrender to his Majesty's enemies, and actually had removed to Vienna. An affidavit, sworn and signed by Prince Starhemberg, stated, that Messrs. Rioul & Smidt had removed the wreck of their fortunes from Trieste, where formerly they had carried on an extensive trade, in order to found a new house of trade at Vienna, at which place they were now established. That they were persons worthy of credit, and had conducted themselves as loyal and faithful subjects of the hereditary states of Austria. Another affidavit, made by the late Austrian governor of Trieste, stated, that they were the principal accredited persons by the Austrian government at Vienna, in all commercial concerns where their house of trade was now established. This, he submitted, was, in itself, sufficient and satisfactory proof of the national character of these persons, although no affidavits were furnished by the parties themselves.

This application to rescind the decree of the court, in order to permit a party to establish its claim, was not without precedent; the case of The Geheimirath, Shack Rathlow,¹ was precisely in point.

¹ A case, in which the Court of Appeals¹ had pronounced a sentence of restitution upon the cargo. After a reference of account sales to the registrar and merchants to report thereon, it was represented to the court, that the further proofs upon which the court had ordered restitution, were impeached on account of the water mark, which, if it had been known, would have operated against the claimant, and led to the condemnation of the property; it was argued that this court would, upon principles of equity,

The Elizabeth. 2 Acton.

[* 59] * BY THE COURT.

SIR JOHN NICHOLL. As far as I recollect that case, it rather proved the rule that this court does not rescind its decrees. The motion to rescind, was made upon a reference to the registrar and merchants; but was refused, as it was said it was not the practice of this court to rescind its decrees, and open the matter anew, whatever other redress the parties might obtain by an application to the court, should it be proved they were materially aggrieved.

The *King's Advocate* denied he had ever been a party to any engagement, to which, had he acceded, he should now consider himself extremely deficient in his duty to his client. Any court would be particularly cautious how it rescinded its decrees, but particularly the Court of Appeal, whose judgment was final, and of such high authority. But, in the present instance, the proofs themselves were objectionable; nothing like proof had been offered to the court; no affidavits of the parties themselves were introduced, and it was possible, that although the claimants might be accredited persons with the Austrian government, at Vienna, they might yet have an establishment of some commercial kind, or even a house of trade at

[* 60] Trieste also. The property *also had been condemned above fourteen months ago; a period of time much too long for these merchants now to expect their application could possibly be attended with any success. Some bounds should be put, beyond which a court would not permit such application, even had it not, as in the present instance, pronounced upon the general principle that it was not its practice to rescind its decrees. Courts of law had settled, that after the expiration of two terms they would not consent to rescind their decrees.

Application refused.¹

and for the purposes of doing substantial justice between the parties, rescind the decree of restitution, in order to let in proof of fraud having been resorted to in preparing these further proofs. But the court refused, and said, their decree being final, it would be contrary to their practice to rescind their decree, and open the subject anew; nor where even it appeared a fraud had been practised, they could not go out of the order of their practice; the parties, however, might apply to the court in another shape, if they could satisfactorily prove they were aggrieved.

¹ It appears, from the registry of this court, that their lordships, in the case of The Harmony, Paoli, December 9, 1807, consented to rescind a former decree, and finally condemned the property; but of the special grounds upon which this application was made, the editor has been unable to obtain any satisfactory information.

The Manchester. 2 Acton.

THE MANCHESTER, Reynolds, master.

May 27, 1811.

Breach of the blockade of Cadiz.

Condemnation of ship, and that part of the cargo laden by the directions of the master for owner's account, under the authority of a letter of instructions from the owner of the ship, which stated the vessel to have been "consigned to his (the master's) order."¹

Wine laden for account of another American merchant by an agent residing in Cadiz, who appeared to act in this instance under the authority of a general order to make such returns as he should consider eligible for goods transmitted to him from this American merchant, in their general course of trade, restored.

By a sentence of the High Court of Admiralty, this American ship, and part of a cargo of wine, had been condemned as lawful prize to the captor for a breach of the blockade of Cadiz; of the remainder of the cargo, part consisting of wine, was ordered to be restored to the American claimant, another part, consisting of salt, was ordered to be restored to the owner of the ship. From this decree, appeals had been prosecuted on the part of the captor, with respect to the goods restored; and on the part of the claimants, with respect to the ship, and that part of the cargo condemned.

* It appeared, by the preparatory examinations and documents found on board, that this vessel, with a cargo of flour and staves, sailed from Philadelphia, originally for the port of Lisbon; but that, on arriving off the coast of Portugal, she was warned, on the 23d December, 1807, not to enter any of the Portuguese ports, being then in a state of blockade, and therefore sailed for the port of Cadiz, where she arrived on the 28th December. By the letter of instructions, the owner, Mr. James, of Philadelphia, directed the master as follows: "Proceed with all possible despatch for Lisbon, placing the business in the hands of my friends, Gould, Brothers, & Co., then giving them directions to remit the net proceeds to Rathbone, Hughes, and Duncan, Liverpool; as the cargo is consigned to thy order, per invoice and bill of lading inclosed." The letter required him to expedite the discharge of the vessel, and proceed to Liverpool, advertising for freight. If goods should not offer, he was enjoined to fill the lower hold with salt. Should the port of Lisbon be blockaded, he was directed to make Cadiz, Ayamonte, or Algesiras; the letter concluded with stating: "I have no

¹ [The Adonis, 5 C. Rob. 256.]

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doubt but thy commission on the cargo will amount to as much as the primeage would be to Liverpool; if not, I shall make it up to thee." It also appeared the master, while at Cadiz, had learned from several American captains that the port was blockaded by the English; and, notwithstanding such information, took on board a quantity of salt, according to his instructions, and the remainder of a returned cargo on freight, partly consisting of wine, laden by R. W.

Meade, of Cadiz, for account and to the consignment of [* 62] * Mr. Ketland, of Philadelphia, and others; and partly of fruit, shipped by Mr. Cooke, an American, then at Cadiz, for his own account. By a letter of advice from R. W. Meade to Mr. Ketland, it appeared the former had been for some time in the habit of disposing of consignments for Mr. Ketland, for which he had made him returns either in cash, bills, or, as in the present instance, by consignments of goods. With this cargo, so circumstanced, the master cleared out direct for Philadelphia, on the 15th of February, 1808, and on the 19th the vessel was captured.

Harrison and *Lushington*, for the captors, argued — That the port of Cadiz having been notified, by his Majesty's order in council of the 8th January, 1808, to be in a state of blockade, the knowledge thereof being actually brought home to the master, both the ship and cargo were liable to confiscation. With respect to that part of the cargo shipped by Mr. Cooke, there could not be a doubt entertained as to the propriety of the sentence of condemnation passed upon it in the court below; as Mr. Cooke, being in Cadiz himself, must have known the actual state of things, and, therefore, must have contemplated a breach of the blockade. The consignment to Mr. Ketland, it appeared, had been made to him without any particular order to that effect; and, consequently, should be visited with the penal consequences of the shipper's misconduct, in putting these wines on board with knowledge of the existing blockade. That part of the cargo consisting of salt having been laden by the master, who, by

the letter of instructions, appeared to be furnished with [* 63] complete authority and control * over the vessel and cargo, it was argued must follow the fate of the vessel; although in the court below a favorable distinction had been made with respect to this shipment, and restitution decreed.

The *King's Advocate* and *Dallas*, for the claimants, contended — That the conduct of the owner of the vessel was perfectly free from any imputation of intention to break the blockade. He had even provided against the probable existence of a blockade, with respect

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to both Lisbon and Cadiz, as appeared by the letter of instructions. The conduct of the master, however, might perhaps be impeached, were the fact of the blockade really brought home to him, which appeared extremely doubtful, as the vessel sailed the 15th February, and the order for the blockade did not issue until the 8th of January preceding. He had admitted he had heard a report of that nature, but denied ever having received any official communication of the blockade. But it appeared that the owner had not left the control of the vessel, or her cargo, with the master; the letter of instruction provided, that, whatever port he should enter, the business of ship and cargo should be placed in the hands of some of the owner's mercantile friends. At Lisbon, with Gould Brothers, & Co., or Dohrnan & Co., if the former should have retired from business there, in consequence of the irruption of the French into Portugal. At Cadiz, the concerns of the vessel were to be placed in the hands of Mr. Meade, and Mr. Robinette, supercargo of the American vessel there. If, finally, he were compelled to enter Ayamonte or Algesiras, he had directions to inquire of Mr. Meade in whose hands the business should be placed. He was, therefore, not the person responsible * for the conduct of the ship. The ship, and his part [* 64] of the cargo, therefore, could not be considered liable to condemnation upon the grounds alleged. The same uncertainty, with respect to the existence of a blockade, might appear to the court a sufficient apology for Mr. Cooke, in shipping the wines laden on his own account, and which had been condemned in the High Court of Admiralty. The goods consigned to Mr. Ketland appeared to have been merely returns for former consignments made by Mr. Ketland, for his own account, to Mr. Meade, who appeared clothed with the character of a very confidential agent for his employer; the time or mode of remittance being, in a good degree, left to his discretion and pleasure. There therefore existed no necessity for a particular order respecting these goods, the documents respecting which were characterized with peculiar fairness and integrity.

JUDGMENT.

SIR W. GRANT. Upon the evidence before us, this must be pronounced a clear case of breach of blockade inwards, under the order which issued respecting the importation of provision to this port. The vessel appears, also, to have broken a blockade formally notified by egress. On the order of the 11th November, 1807, the property would have been liable to condemnation. By the letter of instructions, the master's authority over the conduct of this vessel, and any cargo he might take in for account of the owner, is clearly recognized

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and established. He might, therefore, have prevented the shipment of the cargo of salt, which he appears to have put on board [* 65] with distinct knowledge * of the existence of the blockade.

The salt must, therefore, be condemned. With respect to the shipment made by Mr. Meade, the letters on board and bills of lading show that he had been long in the habit of making returns to and receiving consignments from Mr. Ketland, and had a sort of general order to act for him, with respect to this and other property, as he should consider most advantageous in the state of the markets. There is no necessity to produce a particular order for the shipment of these goods; which must, therefore, be restored. The judgment must stand exactly as it was in the court below in all cases, except in that part of it which refers to the shipment of salt, which is clearly subject to condemnation.

SENTENCE.

Affirmed the decree of the court below, so far as related to the condemnation of the ship, and the restitution of the wine shipped for account of Mr. Ketland; reversed that part of the sentence which restored the salt shipped for the account of the owner of the vessel, and condemned the same as lawful prize to the captor.

That part of the sentence of the court below, respecting the wines shipped by Mr. Cooke, was also affirmed, and the property condemned.

[* 66]

* VROW CORNELIA, Dykstra, master.

July 6, 1811.

Where a license had been granted for the importation of a cargo of brandy, from the port of Charente to Hull, upon a representation that the same had been purchased for account of several British merchants, and was then lying at Charente; the parties' agents in France finding it difficult, if not impossible, to export this cargo from Charente, caused part of the said brandy to be carried overland to Bordeaux, where it was shipped on board a Dutch ship, and a copy of the license indorsed for her protection, the original not being arrived, stating the port of shipment as at Charente. The remainder of the cargo was afterwards shipped in another vessel from Charente, bearing the original license, and arrived at Hull. The former shipment pronounced to have been protected by the license, and the ship and cargo restored.

A case of a Dutch ship, chartered to import from Bordeaux to Hull, under license, a cargo of brandy, for account of several British merchants, principally residing in Yorkshire. In the prosecution of

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her voyage to Plymouth, for the purpose of obtaining convoy up the Channel, she was captured, and proceeded against in the High Court of Admiralty, for non-compliance with the terms of the license. The judge decreed the restoration of the ship, with freight and expenses, to be a charge on the cargo; and, on further proof, decreed the cargo also to be restored, on payment of the captor's expenses. An appeal was prosecuted by the captor, and an adhesion thereto on the part of the proprietors of the cargo, in respect to the captor's expenses.

Leach, for the claimants. It appears the present shipment had been one of several of a similar nature, in general originating with the house of Corlass & Co., of Hull, considerable importers of brandy. Messrs. Corlass & Co., previous to importing a cargo, usually applied to other merchants, to ascertain what proportion each house would take of the intended cargo; but being by far the most extensive dealers in the connection, their order generally doubled the quantity of those of the other houses together. Messrs. Corlass & Co. transmitted a copy of the orders so received to the house of Ranson, *Delamain, & Co., of Cognac, with [*67] orders to fill up, for their own account, as many hogsheads as would complete a cargo. For the amount of which Ranson & Co. had authority to draw on Sturemburg & Co., bankers, and correspondents of Corlass & Co., at Rotterdam. The purchase was completed. The Bremen ship Goede Verwagting was engaged to proceed with a license, obtained by Mr. John Hodgson of London, to Charente, to take on board the said brandy. In consequence of the various decrees of France, affecting neutral commerce, this vessel was considered ineligible, and the American ship Sally, chartered; which on arriving off the French coast was warned off by a British cruiser, in consequence of not having the license on board, which had been forwarded to Charente by Mr. Hodgson. By these delays the license expired, and another was obtained for the importation of these brandies, to continue in force for six months from the 2d January, 1809. Considerable difficulty arose in procuring a vessel at Charente for this purpose, arising from decrees and embargoes of the French government; and also on account of the neutral vessels in that port having been put under sequestration. Neither could any neutral vessel be induced to proceed from any of the neighboring French ports to Charente for this purpose, through apprehension of capture by British cruisers, or of being put under sequestration on their arrival. These circumstances induce Ranson & Co. to forward overland, at a very heavy expense, 300 puncheons (part of 589 which had been purchased to complete a cargo) from the port of Charente to

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Bordeaux, where the same was shipped on board The Vrow Cornelia. The original license not having then arrived, Ranson & Co. indorsed an *authentic copy thereof, received from Mr. Hodgson for the protection of this vessel from Bordeaux to Hull, and afterwards chartered the Dutch ship Johannes Van Letten to carry the remaining 289 hogsheads, which subsequently sailed with the original license on board, which was indorsed by them for her protection, and the following certificate written thereon: "The Vrow Cornelia, of Appengadam, J. T. Dykstra, master, put to sea on the 3d instant, with a copy of this license, the original not then being come to hand, loaded for Hull, with 300 puncheons of brandy, 4 hogsheads of red wine, 160 bales of cork-wood, and 42 cases of prunes; these two vessels have been sent, as no one vessel could be procured sufficiently large to carry the whole of the brandies purchased for the Yorkshire houses, and for the protection of which this license has been granted, signed Ranson, Delamain & Co. Charente, 18th June, 1809." This statement upon oath, by Mr. Corlass, is corroborated by that of Mr. Delamain and his confidential clerks, all averring the property to be in the before-mentioned British subjects, residing in the north of England. Other affidavits have been furnished to prove that the several deponents had ordered their respective proportions of brandy, making in the whole 274 puncheons, on their several accounts; and proving that Ranson & Co. drew upon each house for their respective shares, which drafts were duly honored when due. The proofs of property being so satisfactory, the claimants hope it will appear fit to the court to affirm the sentence of the court below generally, with costs; to pronounce for the adhesion, and reverse so much of the sentence appealed from as decreed the captor's expenses be paid.

[* 69] **Reason for restitution* — Because the said ship and goods were protected by the license obtained; the parties being prevented from conforming more strictly to the terms of the license, by circumstances which they could not control.

COURT.

SIR JOHN NICHOL. At the time of granting this license would not this cargo have been within the protection of the order of 26th November, 1807? Does it appear that order was then revoked?

Arnold. It does not appear it was revoked.

Swaby contended the rule of the court had been to construe licenses largely and beneficially, for the interest of the parties acting under

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them especially when no deceit had been practised; and that the present claimants were, therefore, peculiarly entitled to the most beneficial and indulgent construction under the peculiar circumstances of this case.

The King's Advocate, for the captors and appellants. The present case was formerly argued merely as a case of a vessel sailing with a copy of a license on board, designating the port of shipment differently from the port whence she actually sailed. This is not now the only point which it will be necessary for the court to determine. The evidence in the cause furnishes other grounds of impeachment. It must be always a material consideration with government, in granting licenses, that the place pointed out in the license for shipment should be strictly adhered to. There may be obvious reasons for permitting a shipment at one ^{*}port at ever so small [*70] a distance from another prohibited port of the enemy. Cases have occurred, where vessels having licenses to proceed to ports this side of Morlaix, have been punished for transgressing the permission, and going beyond that port. Such was the case of the ship Hercules,¹ limited to ports on this side Morlaix or Cherburg, which was condemned for going beyond these ports. If the parties cannot do the specific thing which is prescribed by the terms of that instrument, which can alone render such a communication with the enemy's country legal, they are not at liberty to do the very next thing to it, but should apply to government to enlarge the permission. The operations of our marine at the mouth of the river of Charente at that time might be intended to do away all such grants of licenses to that port; and, indeed, it is natural to suppose, it would be under these circumstances an object with his Majesty's government to prevent any vessels or merchandises from coming out of this port.

Another material part of this case is the necessity there exists that the claimants should afford the most satisfactory proof of the identity of these goods, asserted to have been purchased for their account so long prior to their being shipped on board this vessel. The invoices now offered as proof are not sufficiently explicit as to the property, nor is it established by the papers in the cause, whether these brandies were actually conveyed from Charente, or procured from the neighboring vineyards, for the permission of the license goes no farther than to authorize the importation of certain brandies there purchased for these Yorkshire houses, and lying at Charente. The transaction

¹ Lords.

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commenced in 1808, and concludes in 1810 by the shipment. [*71] Where these goods have lain ever since, or at whose charge, is not explained. If they were actually purchased by or on account of British merchants, the French merchant should be shown to have received his money with charges and interest to the actual day of payment or shipment. The proofs of property, therefore, are insufficient.

This shipment cannot be considered within the terms and certainly not within the policy which must govern licenses in general. By a question from one of your lordships it seemed to be inquired whether the whole object of this license was not to obtain a permission to use an enemy's ship, as vessels of a neutral state would by his Majesty's instructions of November 26th, 1807, be protected in such an importation into ports of Great Britain. However general the permission of the license as to the sort of bottom in which these goods might be imported, such vessel was nevertheless bound to conform to the terms of the license as well as the importer himself, and the master should carefully examine, at his peril, whether the intended shipment was within the protection of the license procured before he entered into any charter-party or agreement. Here a mere copy was put on board, which, it is contended, was sufficient to protect this vessel. Such never was the intention of government, for it would open a wide field for fraud, and as in the present case the copy might serve to deceive one of our cruisers, while the original defeated the vigilance of another. But their argument must necessarily go farther, and infer that neither the copy or original license need be on board; and still upon its being objected that a departure had taken

place from the terms of the license granted, it might be [*72] argued upon these principles, that the master was perfectly innocent, having acted on the faith and conviction that such a license as would protect his ship and the cargo on board had been procured from the executive, and was then in existence, as he had been informed by the importer. A copy never could be intended to authorize a second or double shipment, nor can it be supposed to have any efficacy except as a representative of the original. If, therefore, no such extensive permission had been intended by the original, the mere copy could not create it. And in this case it appears there has been an application of a license to a shipment not within its contemplation, either as to the quantity of goods imported or the port of shipment. At first it was not avowed, the original had been applied to another purpose, that of protecting a separate shipment, and the question was considered as one merely of variance as to the port of shipment prescribed by the terms of the license. The

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further proof disclosed the important fact of another shipment being made under protection of the original itself; the parties have, therefore, little to boast as to the candor and good faith of the transaction. This now becomes a striking feature of the case, and will have its proportionate influence on the decision of the court. In courts of common law, as well as courts of prize, licenses have been ever considered instruments *strictissimi juris*, and in those of common law, privileges have been denied a claimant in the interpretation of expired licenses, which have been granted them here. The case of *The Cosmopolite*,¹ where the question as to the propriety of an extension of time, was brought before the court below, the learned judge, in laying down principles for this interpretation, states, that "two circumstances are required to give the due effect to a license; first, that the intention * of the grantors shall be pursued; and, [* 73] secondly, that there shall be an entire *bona fides* on the part of the user." After what has fallen from that learned judge, in deciding on that case, courts of prize should hear no more of a general equity founded on the particular inconveniences and distresses to which merchants are subjected in the present order of things. The claimants' case in fact amounts to a request, that the court will determine and interpret licenses, not by what actually emanates from the royal will in one of the highest exercises of the prerogative, but by something resulting from its opinion upon the difficulties of the mercantile world; or, in other words, that you are to raise up for their accommodation, a license out of circumstances, a request which has been here and elsewhere uniformly refused. It remains, then, to be determined, what bounds are to be assigned to the extension of this constructive protection here contended for. Admit their plea in one case, and it will be impossible to prescribe limits to the indulgence in future. The terms of the license should be conclusive of the question; and the license is for a ship as well as a cargo. If a license of this kind were found inadequate to the purposes of the party, a case should have been submitted to the board of trade, who might have extended the indulgence, although, as it has been an object with France to increase the importation of brandy, it might have been, also, one with our government to restrict it as much as possible. In the case of *The Twee Gebroeders, Jans*,² the protection of a license to import a cargo of salt from Bordeaux, was considered to be forfeited, where it appeared the port of shipment had been changed to St. Martins, although it was said, that specific licenses had

¹ 4 Admiralty Reports, 8.

² 1 Edwards Reports, 95.

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[* 74] *been obtained, at the time, for shipments from the port of St. Martins, and that, therefore, the deviation was not contrary to the policy of government, at the time. And, certainly, it is beyond the powers usually exercised by these courts, to consider the quantity immaterial, and then let in two or three ships with their cargoes, when, evidently, the license itself, and the representation of the parties upon which it was obtained, point out a single shipment; thus altering the proportion of a prescribed commodity to an indefinite extent.

BY THE COURT.

SIR WILLIAM GRANT. Supposing that, as you have argued, two vessels cannot import each a cargo, according to the tenor of this license; can it not be contended that the other vessel is that left destitute of protection, and the present vessel having sailed first, although only with a copy of the license on board, is protected thereby, and thus the license exhausted?

The fact must be taken from what is disclosed in evidence; it is disclosed to be the intent of the parties, that two vessels should be employed. This is altogether a departure from the original license, and their former representations to the council board. It might as well be contended, that if these parties had any other vessel about the same time coming with a similar cargo for importation, this license, if put on board her, would effectually protect such shipment.

COURT.

SIR WILLIAM GRANT. Had you captured the second vessel on her passage, you would have argued very strongly, that these merchants had, by this prior shipment, declared their election; and that the first was protected, the second not; especially as there appears to have been an indorsement on the copy, declaring the intention of the shippers to act, in that instance, under the protection of the original, which had not then come to hand.

It is also very probable that French interests may be in this cargo, and although British interests should suffer, the public service should be preferred to the private interest of parties, at least, guilty of most culpable negligence; at least, more satisfactory proof should be required, which is another part of the captor's case. It is said, these brandies have been paid for by Dutch bills, yet, the court is provided with none of the particulars of these asserted transactions, between these Dutch and English houses, or with any corroborative documents.

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COURT.

SIR JOHN NICHOLL. Such curiosity is, I believe, seldom gratified. The *minutiae* of transactions of this nature, would be too delicate a subject to expose, and might involve many in difficulty or danger. In the court below, no correspondencies of this necessarily secret nature are ever required.

The court, however, will require these parties to show that the whole now actually imported under color of this license, was that quantity intended to be covered when the application was first made for a license. Further proof will also be required on other parts of the transaction. The vagueness of Mr. Corlass's order rendered it uncertain to what extent insurances should be [* 76] effected by his agent, Mr. Hodgson. Nor could it be more satisfactorily determined what proportion of brandy was carried for each house in this ship, or the one since arrived. The whole does not appear like a mercantile arrangement, and is peculiarly liable to suspicion.

13th June. *Dallas*, same side. The first consideration for the court in this case is, whether there was a complete adoption of this cargo by the parties applying for the license, and in determining this, it will be quite immaterial whether Messrs. Corlass & Co., and the other houses, have since paid for the whole or not, if they did not make this purchase prior to obtaining the license; in which case there could be no such adoption as would protect this cargo as the property specified in the license. And here it is observable, the different claimants, although they profess these goods have been paid for by bills on a house in Holland, give no specific dates to these bills, which renders it impossible the court can have at present any satisfaction on this part of the case. Nor are the proofs brought in less objectionable as to their authenticity. The attestation of Mr. Delamain is liable to strong suspicion. No account is given how it originally came into this country. It is well known to the court there are, in this country, persons whose profession and daily occupation is the fabrication of French papers with the seals of official departments, to assist in the introduction of British merchandises into France, and the countries under its influence. This attestation, made by a Frenchman, in France, before a French magistrate, is, nevertheless, made in the English language, and certified by the magistrate in English. The same doubts may fairly be entertained of Mr. Delamain's confidential clerk's affidavit, which is also in the English [* 77] language. The French excise law has also prescribed, with

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much precision, the make of the paper and the stamp to be impressed upon such documents. A strange departure has taken place, in the present instance, from the established custom. This paper is not of the French make, which bears, usually, in the water-mark, the impression of an eagle, and the motto, *L'Empire Français*, but is of Dutch make, and has a Dutch word in the water-mark. These circumstances, combined with others already pointed out, will induce the court to consider the transaction fraudulent; first, in the fabrication of these documents, and, secondly, in applying the copy of a license for a specific cargo, so as to cover a larger quantity than was originally intended to be imported under it.

The license itself was clearly but for one ship. Two vessels, therefore, can, by no latitude of interpretation, be protected by a license granted but for one. In the case of *The Hendrick*,¹ it was held, the parties were entitled to a favorable construction of the license, on the ground of special confidence, the permission being for three ships bearing any flag from Bordeaux, or any other French port. Here the permission is restricted to one port. The cases, therefore, are perfectly dissimilar. Nor is there an instance on record where a party has been permitted to extend the protection of a particular license beyond the express terms of it.

The grant, also, must be considered, as to the party himself, for his own benefit, and expressly for the purpose of doing that which he has, in the first instance, undertaken to do. The law upon this subject was particularly strict, but owing to the inconveniences felt by the commercial world, a greater latitude has been given to

[* 78] *the interpretation put upon these instruments. All the cases

on this subject seem to establish, that the persons to whom the grant is made, the quantity and quality of the articles, the time, and, above all, the place, are material parts of a license. The last, for this express reason, that the executive government may have weighty reasons to prevent the exportation from one particular port, while they permitted it from every other in its neighborhood. The judgment of the High Court of Admiralty, which, in effect, pronounces the importation from Bordeaux to be a compliance with the permission and terms of the license, should be reversed. There existed no stringent necessity to go immediately to take in their cargo at Bordeaux. Their agent might have acquainted the parties, and waited until an alteration had been made by government in the port of shipment.

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The cases of *Shiffner v. Gordon & Murphy*,¹ and *Gordon v. Vaughan*,² are decisive authorities upon this part of the case; the latter of which the Court of King's Bench determined against the assured, upon the ground of their non-compliance with the terms of the license, by which alone the adventure, it was said, could be legalized.

It is not within the sphere of a judge's duty to substitute himself for the executive government; he should pronounce according to the facts in evidence, and the terms of the instrument under which the party claims exemption from the ordinary operations of law. This reasoning is exemplified by the conduct of the French government, which, in this instance, appears to have distinguished between their ports, and would not permit a vessel to clear out from Charente, although from Bordeaux it was not prohibited. The doctrine is also sanctioned by many decisions in this court, and that from whence this appeal has been prosecuted. In *The Twee Gebroeders*,³

**The Cosmopolite*,⁴ and *The Jonge Klassina*,⁵ in which last [* 79] case the learned judge, in pronouncing sentence of condemnation, declared, "the province of the court could go no further than to pronounce whether this transaction came fairly and adequately within the terms of the license, under which alone it could be supported." *The Hercules*,⁶ a case of a Prussian ship with a license to the port of Morlaix, taken going into Cherburg, notwithstanding the vicinity of these ports, the court held that they could not extend the terms of the license; and *The Europa*,⁷ where it is also held, that under such circumstances, application ought to be made to the council office to obtain its sanction.

That the license has been violated in matter of substance, appears, first, from the copy being indorsed as the mere substitute or representation of the original, while the original is applied to another shipment; secondly, from her papers, two sets of which she had on board, one simulated, as usual, but both the bills of lading holding out the port of Charente as that of shipment, from which she did not sail, with a view to deceive our cruisers, lest they should perceive the variance between the port of shipment and that prescribed by the license, while the simulated papers, describing the vessel's destination as for Bergen, state the port of shipment fairly; and, thirdly, from the want of an indorsement on the license of the time of this vessel's clearance from Charente, as was required by the said license. The indorsement on the license, also, states the voyage to be from

¹ 13 East. 296.

² 13 East. 302.

³ Edward's Adm. Rep. 95.

⁴ 4 Adm. Rep. 8. ⁵ 5 Adm. Rep. 297. ⁶ Lords, 1805. ⁷ Lords, May 15, 1810.

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Charente to Hull, whereas it was from Bordeaux. It is made by Ranson & Co., as at Charente, and dated 31st May; while the declaration of the quantities of the cargo is signed by Ranson & Co. on the same day as at Bordeaux. Thus *these two documents, stating the same parties to be in two places at one and the same time, display a fraudulent conduct on the part of the shippers which shows these parties all acted in concert, and were aware of the material departure made from the terms of the license. But the fraud is carried further. The various bills of lading state the vessel to be taking in her cargo "now, at Charente." The whole object of the fraud was to make the port tally with the license; and it never appeared, until the examinations in preparatory, that the vessel actually sailed from Bordeaux.

COURT. It is in evidence that both sets of papers were given up.

Yes, but your lordships will perceive it was then too late. The master had before stated, on his examination, that all the papers had been delivered up, but subsequently introduced the false papers, which described her destination as to Bergen, and the port of Bordeaux as that of shipment; adding, that they had been in his wife's possession, and he did not know they were on board. No credit can be given to such an assertion; and the fraud here attempted to be practised by the master must be attended with the usual penalty of confiscation of the ship. The court has suggested that, as this copy of the license, so indorsed, had been put on board, it might be contended the party had made an election of this vessel, as that intended to be protected by the original. To which it may be answered, the transaction throughout is so replete with fraud, that parties engaged therein cannot be permitted to derive any benefit from this indorsement or supposed election. Both vessels [*81] were clearly navigating the sea at *once, and under the constructive protection of this one instrument. The indorsement on the copy, then, vitiated the license itself, which was on board The Sally; and the absence of the license, coupled with the fact of its being employed in protecting another cargo, rendered ineffectual the copy so indorsed on board this ship; for certainly the practice of the court would go no farther than to restore that ship and cargo, on board which the original itself was found, provided the claimant made out a fair case; for, under these circumstances, fraud would, of course, operate against restitution of either. The whole case is one of the most suspicious character and circumstances; and it is remarkable that the deposition of Mr. Hodgson,

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although the constituted agent of these parties, has not appeared among the proceedings in the cause. His intimate knowledge of the whole transaction rendered it extremely desirable to these claimants he should be examined if their case were a fair one. Among the farther proofs is a minute of the examination of Mr. Hodgson and Mr. Nodin, as to the truth of the facts stated in the petition for a license, taken at the office of Lord Bathurst,¹ which by no means affords any *satisfactory account of those facts most [* 82] suspicious in the case, and states the whole quantity ordered to have been only 262 puncheons. To supply this deficiency, Mr. Junon, ship-broker, of London, has made an affidavit in verification of the property, who can only speak as to his belief, and as he heard from others, being altogether unacquainted with the transaction. It is farther to be observed, that the claim made for five puncheons, as the property of Housman & Co., has not been verified; which, it is submitted, with five others unaccounted for, in the whole number of 589, pretended to be ordered and purchased, are a fit subject for condemnation upon this ground alone.

Reasons for condemnation: 1st. Because the ship, being an enemy's ship, and the cargo a shipment between the enemy and this country, can only be protected by a license *duly [* 83] acted upon. Whereas the present license did not originally authorize a shipment from Bordeaux, and was, moreover, spent, having been applied to another ship.

¹ Minute taken before Mr. Reeves and Mr. Chalmers, at Lord Bathurst's office, December 30th, 1808:

"Upon examination of the memorialist (Mr. Hodgson) and Mr. Nodin, and upon a view of sundry papers produced by them, relating to the several parts of the memorial, it appears — That the memorialist ordered brandies of Ransom, Delamain & Co., of Charente, on the 5th March last, and at other times, till the final order on the 17th May; the whole quantity was 262 puncheons; the brandies were for himself, and for other persons at Rotheram, Leeds, Hull, and other places in Yorkshire; he fixed credit to pay for these articles at Rotterdam. By letters from Ransom & Co., of 6th June, they advised that they had made the purchase. The obstruction to bring home those brandies has arisen in this way: The Goede Verwagting, a Bremen ship, was chartered for bringing them, but this being a ship liable to the embargo in France, another was chartered in England, an American, The Sally, Captain Nathaniel Willis. The Sally proceeded in ballast, about the 25th of October, (the charter-party exhibited is of the 17th of October,) but she was warned off the coast of France by his Majesty's ship Alcmene, Captain Tremlett, 14th November, 1808. It seems the memorialist had sent the license, dated 31st May, to his correspondents, Messrs. Ransom & Delamain, for covering the ship and cargo; a copy of it he gave to the captain of The Sally. The captain of The Sally produced this copy to Captain Tremlett, who deemed it insufficient, being only a copy, and, therefore, warned The Sally back. This is certified by Captain Tremlett's indorsement on the license."

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2d. Because the original evidence did not justify an order for further proof; and the further proofs exhibited in this instance consist only of the attestations of the interested parties, unsupported by documentary evidence avowedly in their possession, to the production of which the captor was by law and practice entitled.

Leach, in reply. As to the first point, that this license was granted for a specific cargo, contended that the cargo ordered amounted to 589 puncheons, as appeared from Corlass & Co., Delamain & Co., and their clerks' affidavits. The minute of the petition and representation for a license introduced was altogether incorrect, in stating the whole intended cargo as amounting to 262 puncheons; and this appeared fully from several depositions, which stated that Messrs. Corlass & Co. constantly doubled the orders received. Nor would it have been an object with them to hazard so very valuable a cargo, because had this license been considered insufficient to cover all, another might have easily been procured. As to the second point, that the license was granted for one ship only, the license was actually granted for a cargo which was then stated to have been purchased and lying at Charente, and which cargo was afterwards divided between these two ships. In the case of *The Johan Peter*,¹ the license was dated in 1808, and the capture in 1810, full [* 84] eighteen months after; and as * it appeared the claimant had contributed all in his power to effect the return of this cargo within the appointed time, their lordships considered the departure as to time immaterial. Applying this rule to the present case, restitution would follow. The many requisites enumerated to give effect to a license, were merely for the prevention of fraud; where a substantial intention was discovered to act uprightly, the court could and would, no doubt, relax the strict letter of the law in favor of such claimants. If the question had merely been, which of these cargoes was protected by a license for a specific cargo, then lying at Charente, had any fraud been discovered in this case, their lordships would probably have pronounced that neither were protected; but here the question was, whether with a complete *bona fides* throughout the transaction, the copy of a license, thus indorsed, would protect the cargo embarked on the faith of the original, in the absence of that original. It would, also, be immaterial whether both these vessels were at sea together; whether the last sailed one day before or after the former's arrival in England. As to the third

¹ Lords, July 7, 1810.

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point, that the grant was confined to a shipment from the port of Charente alone, the same answer might be given. Was there a complete *bona fides* in this respect displayed? From Charente it was impossible to export this cargo; the identical cargo, however, was brought overland to Bordeaux, and there shipped, which was a substantial performance of the engagement to export a cargo from Charente. What injury had thereby arisen to the rights of British cruisers? The port from whence she sailed was described *from Bordeaux in the simulated bills and French passport, [* 85] which were delivered up. The indorsement, as from Charente, merely followed the words of the license itself, which, however absurd, could not be considered criminal. The examination of Mr. Hodgson was now rendered material only to repel the presumptions of the captor, and there could be nothing suspicious inferred from the claimants' not having afforded more proof than was necessary to support his case. Hence the court below had been of opinion that the positive testimony in the cause should not be rebutted by inference of this nature, and decreed restitution.

SENTENCE.

Pronounced against the appeal, affirmed the sentence of the court below, decreeing restitution of the ship and that part of the cargo consisting of brandy, and remitted the principal cause.

*SANTO THOMAS, Castello, master.

[* 86]

June 13, 1811.

Application for a deduction of freight, pronounced to be due to the captor, alleging that damage had arisen in consequence of improper stowage of articles, restored by the sentence of the court below. Application refused, it appearing to the court that no objection had been made at the time of delivery. Application for further proof, as to the exact time of making the objection, refused, in consequence of culpable neglect and delay.

In this case an appeal had been prosecuted from the sentence of the High Court of Admiralty, pronouncing freight to be due to the captors upon a cargo of tallow and hides, carried on board this Spanish vessel from Monte Video to London, upon the ground that these hides appeared to have been damaged to a considerable amount by improper stowage.

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Dallas and Arnold, for the claimant, stating the reason in the case for the appellant — “ That the captor was entitled to no more freight than would have been due to the master for his owner, and in this case none remained due ; part having been paid before, and damage to an amount exceeding the remainder being occasioned by improper stowage, for which the master was responsible ; ” argued that the captor, therefore, succeeding only to the right of the master or owners, should in the same manner derive only the advantages from the contract respecting freight which those parties would have been entitled to had not the capture taken place, and the condemnation vested their rights in the captor. By the affidavits of Mr. M'Taggart, an eminent broker, and others, it was proved the hides had been

materially damaged by placing the tallow upon them, (con-
[*87] trary to *custom,) which were thereby rendered putrid and

were deteriorated in value, insomuch that upwards of 2,000 were sold at 7s. 6d. each, whereas the sound sold for 19s. 6d. ; the total loss thereon amounting to 1,300*l.* And upon a representation of the condition of this cargo to the commissioners of excise, the claimants actually received a return of three fourths of the duty upon 1,972 hides, and one third upon 362. The fact of damage by improper stowage then being established, the claimants had a lien upon the freight still due, (part having already been paid at Buenos Ayres,) more especially as it had been stipulated in the charter-party : “ That the freighter should merely cause the hides to be brought alongside the vessel, from whence the master and his crew should receive and stow the same at his own cost.” Of the freight there now remained due only 962*l.* 10s., which, deducted from the damage, amounting to 1,300*l.*, the claimant, if the court should pronounce for the appeal, would still be a loser of more than 330*l.* This was, therefore, a case in which the sentence of the court below, founded on the registrar’s report, had imposed a great hardship upon the freighters. At common law, the damage would have entitled them to recover against the master or his owner. In the few cases reported upon this subject in our courts, with respect to the general undertaking of a master, by the bill of lading, to deliver the goods committed to his care in the same good order and condition as they were received, a distinction had prevailed, founded upon the man-

ner in which the goods had been put on board, whether
[*88] in open and visible or in *closed packages ; in which latter case the master was entitled to more favorable considera-
tion. Here, however, from the nature of the article, (each being put on board separately, and capable of examination,) it must, of course, be taken strongly against the master, and the whole be considered to be such as the bill of lading had described them.

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King's Advocate, for the captor, contended — That, under the circumstances of the case, it would be unfair to deduct any part of the amount of the alleged damages from the captor's demand on account of freight. It could not be contended that here the allegation of damage in the hides was *prima facie* against the captor, and should throw on him the burden of proving they were in good condition; because here there had been no immediate objection on the part of the freighter. The capture had taken place in January, 1805; the cargo was restored in March; no objection was then made to its condition. An account of freight was delivered by the captors in June, still no objection was stated. On a reference to the registrar and merchants, there appeared to be, for the first time, a claim made for damage, which they stated they did not consider within the reference to them, not perceiving (as it was stated) that the court had pronounced any judgment on these claims, and, therefore, made no report upon the subject. In March, 1809, the King's Proctor prayed the judge to confirm the registrar's report, when the claimant's proctor objected thereto, and prayed to be heard on petition; and the affidavit of Mr. M^t Taggart and another was introduced to prove the damage, which also stated his opinion respecting * its cause. The report was, thereupon, referred [*89] back to the registrar, to report if any deduction should be made from the freight formerly pronounced to be due; who reported that there appeared no ground for altering the report. The judge confirmed this report, and the party thought proper now to appeal. This delay and negligence therefore must, he contended, be fatal to the claim, had it been ever so clearly established; especially as the court must see the captors never were any party to this agreement or charter-party upon which it is contended the ship's owner would have been liable. The objection should have been on delivery, for the party was not at law allowed to receive the goods and afterwards refuse to pay the freight.

Dallas suggested the certificate of the custom-house officers, stating the reduction that had taken place in the duties on these hides, and that they were thus injured in consequence of improper stowage, was dated in June, 1805. It was, therefore, to be inferred the objection must have been taken before this, and shortly after the capture.

King's Advocate stated it would be material to ascertain the practice of shippers in South America, before it could be possibly determined whether this mode of stowing were unusual. The affi-

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davit of the broker did not affect to state the custom. If it were improper, however, the shipper might still resort to his [* 90] action * at common law, and recover part of the money already paid in advance.

The court stated it was still uninformed when the objection was first made. The delay was extraordinary, and could not but present itself as a very material objection to the demand.

Dallas requested the party might be permitted to show when this objection first was taken. The claimant was in possession of documents, which, he was instructed, spoke as to that circumstance.

BY THE COURT.

SIR JOHN NICHOLL stated this sort of evidence might have been rebutted by the Spanish master's testimony, whose evidence, by the unaccountable negligence of the claimant, it was now impossible to procure, having long since, in all probability, left this country.

Dallas argued that the determination of the registrar and merchants had proceeded upon a wrong ground, namely, that the claimant was bound to show their good condition when shipped. The question now was argued upon quite a different ground; the sentence confirming that report of the registrar should not be affirmed.

King's Advocate replied — That the admission of such evidence now would directly operate against those who could not possibly be in a condition to answer it.

[* 91] The court considered the evidence of the Spanish master, under such circumstances, would be material, and affirmed the decree of the court below.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below.

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* SANTISSIMA CORACAO DE MARIA, Carneiro, master.

June 20, 1811.

Colonial trade. Portuguese subjects trading with the enemy's colonies, cannot avail themselves of the treaty of 1754, subsisting between this country and Portugal, as excepting them from the general restrictions imposed on neutrals trading with those colonies.

Contraband outwards on board a Portuguese vessel trading with the enemy's colonies, enures to her condemnation *on the return voyage*.

The law of contraband, the same with respect to Portugal as other neutrals, notwithstanding the above treaty.

THIS Portuguese vessel sailed from Oporto, in 1806, with a professed destination for Vera Cruz, where she delivered her cargo, consisting of iron in bars, tar, pitch, fish, bunting for colors, gin, &c., and took in return cochineal, indigo, cocoa, bark, &c., with which she sailed for Oporto, but having deviated into the Havana, from distress, (as asserted,) was captured and carried to New Providence, where proceedings were instituted. A claim for the ship and cargo, as Portuguese property, was admitted; but the court directed further proof, to show wherefore the outward cargo was divided into two bills of lading; whether both were shown to the British consul at Oporto, and this certificate obtained upon a full knowledge of their several contents; whether both bills, with the invoice and clearance, were again produced to the searching officers of the king's ships which visited this vessel on her outward voyage; and whether they were apprised of the facts of pitch and tar constituting great part of the cargo; also, whether the pitch and tar were native productions of Portugal, and why the outward cargo was sold at [* 92] Vera Cruz without the intervention of a Spanish agent, or the charge of any duties. The judge directed this further proof to be exhibited by plea and proof within twelve months. Various papers were invoked by the captors. After the expiration of eighteen months, the judge pronounced the claimant's proofs insufficient, and condemned the ship and cargo.

The reasons, in this case, for condemnation, were, Because the ship had supplied the enemy with articles contraband of war, on her outward voyage, in violation of the order of the 24th June, 1803; and the cargo is the proceeds of that shipment, claimed for the person who was the charterer of the vessel on that voyage, and principally concerned in the management of that illegal transaction.

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Those for restitution were, Because the ship, having a Portuguese flag and pass, and a Portuguese crew, was protected, together with her cargo, by the Portuguese treaty.

2d. Because no further proof was necessary; and the manner in which it was ordered and acted on was productive of extreme vexation and injustice to the claimants.

3d. Because the effect of the further proof produced by the captors, did not impeach the regular evidence in the cause.

King's Advocate and *Burnaby*, for the captor. This vessel appears to be liable to condemnation, as well upon the ground of illegallity

in the voyage, as of defect in the proof of property. With [* 93] respect to the property, * it is remarkable, the master claims for the ship as the property of Mr. De Silva and others, and for the cargo as that of Mr. De Silva alone, to whom the vessel was chartered. He appears to have been the agent for ship and cargo, and the proceeds of the outward cargo were directed to be invested by him in a return cargo. His conduct, therefore, clearly must bind the owner or owners of the cargo. Several persons appear to have property on board this vessel on her return voyage, which fact is suppressed by the master in the preparatory examinations. In the invoked papers are letters distinctly stating, that a priest, who had embarked in this vessel at Vera Cruz, for Spain, would, by this capture, lose about seven thousand dollars, the value of ten seroons of cochineal, shipped on board nominally for the account of others, but actually on his own; that the Spanish clergy would suffer considerably, amounting to 200,000 dollars in specie, and also several merchants of Vera Cruz, who had made large shipments for Spain by this vessel. Another invoked letter, from a shipper at Mexico to a house at Cadiz, advises them of having shipped cochineal for their account on board her. This, and other passages, distinctly point out an actual destination for Spain, and also impeach the evidence of property, a considerable portion of which appears to be that of the enemy. On this ground, the cargo having been falsely described, in order to protect these goods by a neutral character, the court cannot admit further proof to enable the parties now to distinguish the one from the other.

Upon that part of the case, relating to the deviation into the Havana upon her return voyage, it is obvious, from the disclosure of facts which has taken place, that the master had it in contemplation previous * to his departure from Vera Cruz.

This priest actually embarked at Vera Cruz for the Havana, as appears by the letters found on board, recommending him to dis-

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ferent persons residing there. The pretext for entering this port, is merely that the meat on board being rotten, and the water expended, the crew, therefore, compelled the master to make this port. When the distance of this port from Vera Cruz is compared with the length of the entire voyage to Portugal, it cannot be supposed possible, the provisions intended to last for the latter, should be altogether consumed or rendered unfit for use in so small a part of it. The real purport of this deviation may be discovered by considering what has become of the 200,000 dollars said to have been shipped by the clergy. They are not found on board at the capture, therefore must have been left, at least, in part, at the Havana. In his examination, the master makes no mention of any specie being on board, except 5,400 dollars, which, although described as his own property, and that of some relations, the returns of some private adventures, may, with tolerable certainty, be considered the remainder of those shipped for account of the clergy, as he could not, without great danger, attempt to bring back specie in return, the law of Spain having rendered it illegal under these circumstances.

The invoked letters go very far to induce a suspicion this vessel was returning to Cadiz, and not to Lisbon, as also the consignments which appear to have been made direct to persons at Cadiz. Upon the ancient principles by which the commerce between the colonies and mother country have been regulated, this property must be liable to confiscation. The Portuguese treaty, it is said, protects * the property of the different shippers. Whatever may be [* 95] the effect of that treaty as to the trade between the mother countries of Spain and Portugal, upon the general principles laid down by one of the best authorities, Montesquieu,¹ it cannot be strained to extend to the colonies of Spain. This species of commerce is merely one of a privileged nature; and it must not be inferred, because a particular nation has obtained a permission or privilege beyond others, that permission is to extend to an illegal interference in the trade between the colonies of the enemy, or those colonies and the mother country herself. It has been decided, the Portuguese treaty is not to be construed to cover or protect any cases of fraud;

¹ Montesquieu, speaking on this subject, says: "It has been established that the metropolis or mother country alone, shall trade with the colonies, and that from very good reason." "Thus it is still a fundamental law of Europe, that all commerce with a foreign colony shall be regarded as a mere monopoly, punishable by the laws of the country." "It is likewise acknowledged, that a commerce established between the mother countries, does not include a permission to trade in the colonies; for these always continue in a state of prohibition." *Spirit of Laws*, book xxi. c. 21.

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which may also be collected from the terms of the declaration of 1780. In the case of *The Nova Aurora*,¹ which was a ship and cargo claimed for a party under the Portuguese treaty, although the court held the property might be restored, yet it was upon different grounds, and it then took an opportunity of observing, that many were incurring considerable hazard by running a similar course with the present, unless it could be inferred the intention of the treaty was to throw open the trade altogether. The court restored the property; an appeal was afterwards entered; which, however, was abandoned;

and, in the court below, wine, to a port of military equipment,

[* 96] has been considered contraband, as in the case of **The Asia*. These instances will serve to prove that the Portuguese nation has hitherto been included within the general restrictions imposed on the commerce of neutral nations under such circumstances. To obtain restitution, the claimant must show an exemption from the law of nations very different from that which it is presumed he derives from the treaty, the treaty being only intended to preserve to Portugal a peace-right, and altogether inapplicable to any permission to violate the known colonial regulations. Several claims of this description were made in 1749, for French owners, before France was engaged in the war, upon the French treaty, and also in 1756, for Dutch owners, upon the Dutch treaty; but the courts have recognized no such privilege to interfere in the close trade of the enemy.

In support of the captor's allegation, a witness, named Monte negro, has been examined, whose testimony the claimant has in vain attempted to impeach. His deposition states, he has long known the vessel; first saw her at Vigo; that she is the property of a merchant near Vigo, and Don Pedro Echeverria, of Vera Cruz, as he has had opportunity to ascertain by inspecting the books of the latter, being employed in his counting-house; that the present voyage was to have concluded at Vigo, for which port it was openly advertised, at Vera Cruz, she was taking in a cargo; the outward cargo was delivered to the said Echeverria, and by him disposed of; the return cargo belonged in part to him, and partly to De Silva and others; that 200,000 dollars in specie were put on board this ship at Vera Cruz, the greater part of which not being found on board at the time of capture, he

concludes was landed at Havana; lastly, that the register [* 97] shown to him of the return cargo found on board at *the time of capture, is not in the usual form of such registers. By the testimony of others, it appears a spoliation of papers had taken

¹ December, 1806.

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place, that part of the agreement between the master and crew, which should have been in the master's possession, not having been delivered up.

Whatever might have been the effect of the treaty formerly, is, since the order of the 24th June, 1803, very immaterial; that order was made expressly to regulate the neutral trade with the enemy's colonies, and provides "that all such neutral vessels as are employed in trading direct between the colonies of the enemy and the neutral country to which the vessels belong, and laden with the property of inhabitants of such neutral country, shall not be interrupted in that trade, provided that such vessel shall not be supplying, nor shall have, on the outward voyage, supplied the enemy with articles contraband of war." This was the criterion by which the present claimant might have ascertained upon what foundation his ideal national privilege stood, before he engaged in a trade so hazardous and unprecedented. This order alone contains the terms upon which, at present, all permission to trade with the colonies of the enemy rests; the consequence of extending which to the length contended for, would be to ensure the Portuguese the privilege of carrying home colonial produce not only for their own consumption, but also the colonial produce of the Spanish colonies, which, considering the contiguity of the kingdoms of Spain and Portugal, would be the same as permitting their direct trade from Spain to her colonies at once. The principles laid down by the court below in the cases of *The Nancy*¹ and *The Richmond*,² will, therefore, be decisive of this case, and the greater * quantity of contraband on board the prize must [* 98] be considered an aggravation of the offence.

Further proof is altogether inadmissible, as the whole property has already been claimed by Mr. De Silva, under a false description, and the voyage appears to be one with false papers, purporting a destination to Lisbon, but deviating into an enemy's port, under circumstances of suppression and fraud.

Dallas and *Addams*, for the claimant. The objections made to this trade are applicable in three different ways, in each of which the question has been considered: 1st, Fraud without illegality in the nature of the trade; 2dly, Fraud with illegality; and lastly, Simply illegality in the trade itself. From the inquiries made by direction of the court below, it would appear the question was there decided solely on the ground of fraud, and that had no such fraud appeared to

¹ Adm. Rep. vol. iii. p. 136.

² Vol. v. p. 825.

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constitute part of the case, the transaction would have been deemed legal. Here the argument has principally been directed to the two latter points, and the property considered condemnable, either upon the ancient established colonial law, or the colonial law as regulated within the present war by the order of the 24th June, 1803. The error of the master in comprising different claims for different parts of this cargo in one general claim for Mr. De Silva of Oporto, it is conjectured, will have the effect of inducing the court not to grant any further opportunity of proving more distinctly the property of the several owners of the cargo, should the court consider further proof necessary. But it will be found altogether immaterial whether these goods are the property of one person or several. By the treaty

of 1654, this country acknowledges that Portuguese bottoms

[*99] shall make *Portuguese goods and merchandises. The captors are not, therefore, in a situation to inquire whether these goods belong to one or more proprietors. By this treaty the property of even enemies on board would be protected, because the vessel is Portuguese. If, therefore, there be any necessity for further proof, this circumstance will not affect the claimants, and prevent its introduction. Upon the question of contraband, an objection is made which it is supposed must be fatal, from the terms of the order 24th June, 1803. Here it is submitted, that the pitch and tar appear to have been openly carried, without disguise or suppression, which, although it will not render it fair, if generally illegal, yet it materially alters the question from a common case of contraband. The pitch and tar not being carried out under false papers, cannot induce condemnation of ship and cargo on the return voyage. The term contraband is altogether relative in its meaning, as that which is contraband on board a Dutch vessel is not so on board a Swede. Pitch and tar are only liable to preëmption as being the natural produce of the latter country. Here, also, the owner of this property should be put upon at least the same footing as a Swede, from the protection afforded him by the terms of the Portuguese treaty of 1654, which admits that Portuguese ships make Portuguese goods and merchandises. From this treaty neither party can retreat by any act of its own alone. If, therefore, pitch and tar were, at the period of that treaty, considered goods and merchandises, they must be considered so still. Although we have since altered the determined meaning of the term contraband with respect to other nations, it must remain the same with respect to Portugal, and her rights remain the same,

unless it can be shown that some express stipulation has [*100] been entered into *to concede those rights. To determine this question we must examine the treaties themselves, for

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this is not the only treaty extant between this country and Portugal, and also inquire what was then the general law respecting contraband throughout Europe. An opinion given by Sir Leoline Jenkins, to be found in the second volume of his work, published about the year 1674, as to the character of these particular articles, is favorable to the present case, and seems to have considered these articles, under similar circumstances, not of a strictly contraband nature.

On referring to the articles of these treaties, it will be found there is no enumeration of articles of a contraband nature in the treaty of 1654; nor do pitch and tar form any part of the exceptions of that treaty. It has been denied these treaties have any thing to do with the regulation of the trade to the colonies. It is, however, remarkable that the eleventh and sixteenth articles of the treaty 1654 relate to the trade with America and Africa, and the eleventh to the trade to that with the East and West Indies.

By THE COURT.

Is there any thing in that treaty which would legalize a trade at that time considered illegal?

No, my lord; but there is a wide difference between things then actually illegal, and those which have since been denominated illegal. The illegality here contended for is of modern date, consequent upon a change of circumstances.

COURT.

Yes; but it has been attempted to justify a trade by Dutch ships to the colonies upon the articles of the Dutch treaty, yet this was ineffectual, and the court condemned those Dutch vessels.

* The object of the Portuguese treaty was to grant the [* 101] Portuguese nation a decided advantage in trade over other nations; they are not, therefore, to be considered as in the same situation as other neutral merchants, as has been urged. Our policy has induced us to grant these facilities and advantages for obvious reasons. The eleventh article of the treaty 1642¹ provides, that subjects of the king of Great Britain may carry victuals and arms to Spain, so as not from Portugal itself, in the event of a war between Spain and Portugal, and that Portuguese subjects may have the same privilege should a war arise between Great Britain and Spain.

¹ This passage has not been compared with the treaty alluded to, having in vain endeavored to procure a copy of it.

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This has never since been changed by subsequent stipulation. The following treaty partakes of the same spirit. Under these circumstances it would be extremely hard to consider the case of such claimants liable to be affected by the general law of contraband as applied to other nations at the present day. Nor can the mere order of June, 1803, be taken to have new modelled, by its vague and general terms, the law of contraband with respect to Portugal, which had for its foundation these two treaties.

If the case should require farther proof, the claimants are prepared to afford every information. In the court below difficulties occurred, owing to the state of Portugal, and the impossibility of collecting proofs and transmitting them to New Providence within the time limited, there being no direct communication between Portugal and New Providence. The captors pressed for adjudication, and the pro-

perty was condemned. The information required by the [*102] judge below is *partly unnecessary, from the original evidence adduced in the case. It has been said the two bills of lading were framed purposely to deceive cruisers. This would be productive of no advantage while the clearance was on board, which is a most material ship's paper. In both this and the invoice these objectionable articles are detailed without any attempt at disguise. The cargo being of a very miscellaneous nature, the different articles were too numerous to be contained in one bill of lading, two became necessary; and it is remarkable the certificate of the British consul states these goods to be the property of Portuguese subjects, as appears from the bills of lading which were duly shown to him. The imputed suppression or concealment of that bill of lading containing these articles, is falsified by the positive admission of this British consul; and these bills, as well as the other ship's papers, all equally explicit, were shown to several searching vessels in the course of the voyage, any one of which papers must have acquainted them with the nature of the cargo. The whole transaction is characterized by the utmost fairness, and it is presumed, whatever may be its legal effect, with respect to this part of the cargo, it will at least procure the claimants the advantage of introducing farther proof as to the remainder, if such further proof shall be considered necessary.

King's Advocate, in reply, argued, that from the insufficiency of the proof of property, and the positive testimony of some of the witnesses, who clearly proved an enemy's interest therein, this ship and cargo being thus falsely represented was liable to condemnation.

The Santissima Coracao de Maria. 2 Acton.

* *Dallas and Addams* strongly objected to the course pursued. [* 103] The reason in the captor's case solely applied to the illegality of the trade either in respect to the orders of council, or the contraband nature of the goods. A new ground of impeachment had since been taken, the insufficiency of the proofs of property. This was taking an unfair advantage of the claimants, who should have been informed by the captor's case what they had to defend. Indeed, for fairness, it should be understood at the bar, that when it was intended to pursue this ground of impeachment, one of the reasons in the case should distinctly state the objection as to property.

As to the trade in which this vessel was engaged, the order of June, 1803, was precisely applicable, and furnished sufficient ground for condemnation. The nature of such a transaction would not now be decided by a reference to the construction put on contraband in the year 1654. The term contraband, in the order, related to that which in general acceptation was considered contraband when the order issued. No doubt could be entertained of its meaning in 1803. Pitch and tar had then been held contraband by the decisions of these and other courts. It had been argued, although the treaty would not certainly protect Portuguese subjects in a trade clearly illegal; yet such illegality must be proved to be of a contemporaneous nature. Since the decisions above mentioned, this subtle distinction, if it could ever avail, must have been futile. But the principle upon which it was attempted to be established was highly objectionable. Supposing a material change had now *taken place in the art of war, and those articles now [* 104] considered contraband should be disused, and others substituted which had been hitherto considered inoffensive; and that subsequent to such a change, an order of a similar nature had issued, would not every court of justice construe an order prohibiting the importation of contraband into the colonies as adapting itself to such a change?

BY THE COURT.

SIR WILLIAM GRANT. As it has been suggested that one treaty permits even the exportation of arms to a belligerent; if counsel are disposed to go that length, it may be contended there can be no contraband with respect to Portugal.

Addams. So far as respects the inference of Portuguese subjects in a war with Spain and Great Britain, it certainly might. In this treaty there is no enumeration of contraband.

The Santissima Coracao de Maria. 2 Acton.**JUDGMENT.**

SIR WILLIAM GRANT. It never was the intent of this treaty to except the Portuguese from the general prohibition to trade with the colonies. Portuguese subjects must now take the law relating to the colonies to be the same with respect to them as other nations. The late order regulating the trade by neutrals to the enemy's colonies contains specific exceptions, one of which is an express prohibition to carry contraband outwards, and it is of no consequence what, in 1654, was the precise meaning of the term. What is the idea conveyed by the order of June, 1803? This applies to [* 105] * all sorts of contraband then existing. It was their duty to have ascertained, when there was such just reason for doubt and apprehension with respect to this undertaking, that the opinion they were disposed to entertain of the treaty was well founded. It is to be regretted, certainly, that the party should have been so far mistaken, and took no pains to provide satisfactory information upon this head; and it appears to us the claimants have now taken up a question upon which there cannot be entertained a doubt. The sentence of the court below must, therefore, be affirmed.

Dallas applied for the claimants' expenses, as they had been led into considerable intricacies and expenses by the unusual mode prescribed for furnishing proofs by plea and proof, and when so much doubt had appeared to have existed in the mind of the judge of the court below, from the course which he had adopted, it was not unreasonable to suppose they might have considered themselves exempt from the ordinary restrictions imposed on other neutrals in the conduct of this trade.

Application refused.

SENTENCE.

Pronounced against the appeal, affirmed the sentence of the court below, condemning the ship and cargo, and remitted the cause.

The Franklin. 2 Acton.

* THE FRANKLIN, Forsyth, master.

[*106]

June 20, 1811.

A case of rescue.¹ Argued that as the ship and the cargo were the property of different persons, this description of case not hitherto decided, and the owners of the cargo were not bound by the misconduct of the master. Objection overruled, ship and cargo condemned.

AN appeal from a sentence of condemnation of ship and cargo, pronounced by the judge of the Vice-Admiralty Court of Gibraltar, as rescued from the prize-master put on board whilst proceeding to a port for adjudication.

The *King's Advocate*, for the captors, adverted to the circumstantial evidence exhibited in the case, proving the fact of the master and crew having risen upon the prize-master and his men, whom they had confined below, whilst the ship's course was altered for her own port of destination. In the prosecution of which intention this ship was again captured. He now prayed the sentence might be affirmed.

Dallas, for the claimants, submitted that in this case, notwithstanding the vessel's course had been changed by the interference of the master and crew, yet it would be difficult to make out a case of rescue from the evidence, as it appeared no actual force had been employed; but that from the improper conduct of the prize-master, as it was stated in an affidavit made by one of the crew, the ship was considered to be in danger; and by the consent of the remaining parties, it was resolved the vessel should be navigated by the master. The mere circumstance of the vessel's course having been shaped for a different port from * that to which she had [*107] been bound by the direction of the captor, would not, he contended, affect the interests of the claimants upon the principles laid down by the court in the case of *The Pennsylvania*, M'Pherson;² when the court held that, "there was no duty imposed upon the master or crew to navigate the vessel to a port for adjudication." To secure the capture was said to be a duty imposed on the captors at their own peril, in which, having failed by providing only a com-

¹ [The Dispatch, 3 C. Rob. 278; The Topaz, 2 Acton, 20.]

² 1 Prize Appeal Rep. p. 37.

The Franklin. 2 Acton.

plement of men inadequate to navigate the vessel; the master, on resuming the command, had sailed for his own port, and the court decreed restitution. The property of the greater part of the cargo was not that of the owner of the ship, which raised a very material consideration, whether the fate of a vessel condemned for a rescue, would involve the interests of other persons who were the shippers of the cargo, and totally unconnected with the owners of the ship. This was altogether a novel question, and one which, upon a review of the cases, had not yet been decided. There was, certainly, a *dictum* recorded in the case of *The Catharina Elizabeth*,¹ where the court said, the consequence of a rescue, "had it been by a neutral master (the master there being an enemy) would undoubtedly reach the property of his owner; and the judge thought it should extend also to the confiscation of the whole cargo intrusted to his care." It must be observed, however, this was merely a *dictum*, the case before the court not at all comprising such a question. Upon the obvious principles of justice and equity, when there were separate owners of the cargo and ship the conduct of the master ought not to bind the

owner of the cargo, who could not be considered as having
[*108] *reposed any confidence, or capable of exercising any control over him. Upon this equitable principle the court had uniformly regulated its decisions with respect to the other questions, where it had been argued the act of the master should affect the interests of other persons. In the cases of breach of blockade, of contraband, and of despatches—in *The Mercurius Gerdes*,² when the master committed a breach of blockade, with notice, the owners of the cargo were admitted to farther proof, it appearing that the master was not specially constituted their agent, nor were they then cognizant of the existing blockade. Other cases of a similar nature had since occurred which sanctioned the principle upon which the court then proceeded. In *The Atalanta*,³ when despatches had been carried to the enemy, both ship and cargo were condemned, because the whole expedition had been intrusted to the supercargo, who was acquainted with the nature of the despatches, and in whom the owners had reposed confidence. In the next case,⁴ the master was part owner of both ship and cargo, and constituted agent for the residue; and there, also, upon the same grounds, the ship and cargo were condemned. In the next, *The Susan*,⁵ the ship was condemned, and the cargo was restored, including even that part of it belonging

¹ 5 Adm. Rep. 282.

² Adm. Rep. 80.

³ 6 Adm. Rep. 440.

⁴ Constantia Holbeck; 6 Adm. Rep. 461, *in notis.*

⁵ Ibid.

The Franklin. 2 Acton.

to the owner of the ship, a distinction having been taken that the master did not appear to have been appointed agent of the cargo, and although his general agency for the ship would affect that part of the property, the residue of the same owner's property should not thereby be affected. This was carrying the principle to its utmost bounds.

* *Arnold*, same side, argued — First, that the rescue was [*109] improbable, if not impossible; it appearing that the crew consisted only of four effective persons, a boy, and an aged cook; whilst the prize-master's force consisted of seven men, all effective. And, secondly, that no rescue was proved to have been attempted, no force had been resorted to; and the only fact which could serve as a pretext for such an imputation was that of throwing overboard the arms which lay on the quarter-deck in an open basket.

COURT.

SIR W. GRANT. It is in our minds, from the evidence adduced, clearly a case of rescue.

In the few cases of rescue to be found reported, the present question had never yet arisen. In *The Dispatch*, Addison,¹ the master and crew, with the supercargo, rose and rescued the vessel. Here all parties were bound by the act of their agent; and both ship and cargo were condemned. In *The Carmelite*, Ash, 15th December, 1802, ship and cargo belonged to one person. In *The Washington*, the ship and cargo were both the property of the same person, and both condemned. In *The Mars*,² the ship and cargo were both condemned, the cargo being the property of the ship's owners, the supercargo, and two others. In none of these had, therefore, the question arisen. Having no direct authority, the question should be argued by analogy. In *The Alexander*, Ages,³ a case of breach of blockade, where the ship was condemned, and it was objected that the owners of the cargo were not bound by the act of the master. The judge admitted that had the master deviated, under particular directions from the ship's owners, to land part of his cargo at the * blockaded port, unknown to the rest of the shippers, such [*110] partial instruction might lead the court to consider with indulgence that distinction, in favor of those shippers who had meditated a legal voyage; but as the case stood, no such distinction

¹ 3 Adm. Rep. 278.

² Lords, 10th June, 1809.

³ 4 Adm. Rep. 93.

The Franklin. 2 Acton.

could be raised from the facts proved. Upon these authorities, he contended, the claimants were here entitled to an equal, if not greater share of favorable consideration. In *The Adonis*,¹ the claimant's case failed, because the fact of purity of intention on the part of the owners of the cargo was not shown; it would have been otherwise if the fact had been established.

King's Advocate, in reply, said — If the question were new, it was the highest time it should be settled by a solemn decision. Although acts of a master did not in all cases bind, yet in most they did; and, he apprehended, particularly in those instances where the principle was found necessary for the protection of belligerent rights; if so, the present case would be included. Where no possibility of privity between the master and his employers or freighters existed, courts had relaxed the rule respecting blockades, and granted greater indulgence to the parties. Where the possibility existed, they had acted directly the reverse. Infinite danger would attend the admission of shippers to distinguish their purpose from that of their master. The case of contraband and of despatches, did not support the principle contended for. The enforcement of the right of the captor to bring in for adjudication, upon which so much depended in the conduct of a war, was too important not to claim the particular [* 111] * attention of the court. It was such a necessary right, and acquiescence on the part of the neutral was so imperatively enjoined, that any infraction of the implied compact would be attended with the most dangerous consequences, and should, therefore, be punished in the most exemplary manner, by the confiscation of the whole property engaged. Counsel had urged that where there was no case in which a diversity of interest had been brought before the court for sentence. It might be true; but the case of the Swedish convoy,² he thought, would be quite decisive in principle upon this case, when the court condemned all the property withheld from search.

Dallas objected — That, in the Swedish convoy case, the court had decided on different grounds from those submitted here for condemnation, the owners of the cargoes having put them on board with knowledge of the intended convoy and its purport.

The court took time to deliberate.

¹ 5 Adm. R. 261.

² 9 Ibid. 408.

The Minerva. 2 Acton.

June 25th, 1811. The court pronounced against the appeal, affirmed the sentence of the court below, condemning the ship and cargo.

* MINERVA, Glen, master.

[*112]

July 25, 1811.

Question on joint capture. A postponement, on the part of the actual captor, in taking a prize which might, during several hours previously, have been reduced into possession by such actual captor, during which the constructive captor, a king's ship, remained in sight, and communicated by signals with the actual captor, objected to as fraudulent, no intimation having been given of the suspicions entertained of the prize by the actual captor; in consequence of which the other bore away from the prize, without affording any coöperation, and was out of sight at the time of the capture, which occurred after dark.¹

Decree pronounced for the exclusive interest of the actual captor, the foregoing circumstances being held insufficient to found a claim to joint capture.

In the Vice-Admiralty Court, at Jamaica, the judge had pronounced for the interest of his Majesty's ship La Pique, as joint captor of the prize in question with his Majesty's brig Goelan, and rejected a similar claim on the part of two other vessels; against which sentence, so far as respected the interest of La Pique, the actual captor appealed.

Dallas stated the respondent's case. The reasons adduced for affirming the sentence pronounced in the court below were: "Because La Pique was in sight, and known by the commander of The Goelan so to be, from between three and four o'clock, P. M., till dark, during any part of which time The Goelan might have made the capture in question; and, 2dly, Because the interest of a ship in sight cannot be defeated by a delay wilfully made till after dark, with a view to defeat that interest." The joint captor's allegation pleaded, amongst other things, that on the day of capture, about three o'clock, two vessels were discovered by La Pique in company, about three leagues distant. Soon after La Pique and one of the ships in company exchanged signals, and became known to each other; she proved to be The Goelan; and, about six, lowered a boat and sent some persons on board the prize, La Pique being still in sight, but the light-

¹ [For cases as to joint captors, see The Nordstern, 1 Acton, 128, note.]

The Minerva. 2 Acton.

ness and variable state of the wind prevented her coming up with them. And, lastly, That if The Pique was not in sight at the precise moment of the actual taking possession of the strange ship [*113] by The * Goelan, it was owing to the fraud practised by the commander and crew of The Goelan, in laying by and hovering about the strange ship, and postponing such taking possession of her until after it was dark, with the view and intention of excluding the commander and crew of The Pique from sharing in the capture; the said commander and crew of The Goelan well knowing that, because of the lightness of the wind and the distance The Pique was off, she could not come near to The Goelan in time to defeat this purpose; that the commander and crew of The Goelan might have taken possession of the strange ship at any time during the said afternoon, but they thought it best to defer so doing until dark, with the view and intention aforesaid." The counter allegation of the actual captor admitted the fact of sight until five o'clock, and the interchange of signals, as well as the passing and repassing of a boat between The Goelan and prize; but objected to the possibility of the latter's being seen by La Pique, having then been out of sight upwards of an hour. It was so dark when possession was taken, that, although within hail, The Goelan could not be seen by the prize; and further denied that The Goelan had postponed taking possession until dark with any fraudulent intention. Finally, maintained that La Pique might have come up with both vessels, had she not been steering a contrary course direct for Port Royal. The examinations of several witnesses corroborated the facts alleged by the joint captor. The mate of the prize deposed the prize had previously been captured by The Goelan, and, after adjudication, released; that the prize departed from Port Royal again, on the 1st

January, The Goelan in company. About six the prize [*114] was boarded by The Goelan again; * a boat returned to

The Goelan with Glen, the master; and afterwards, about seven, a prize-master and crew came on board. Watson, a seaman on board the prize, said, at one o'clock that day La Pique was within three miles of the prize, standing up to her. On exchanging signals with The Goelan, she tacked and stood away; about five o'clock The Goelan hailed the prize, and again a quarter after five. She, about that time, made signals to La Pique, and sent her boat on board the prize, which carried back the master about six, then nearly dark; when the boat came first, La Pique was in sight from the round tops, and about three leagues distance. The boat's crew had said, The Goelan had been sent out by the admiral expressly to make this capture, but would not attempt it until they had got out

The Minerva. 2 Acton.

of sight of La Pique, the harbor, and shipping, that she might be exclusively her prize. The purser of La Pique, a releasing witness, corroborated this statement; adding that, at a quarter past four, he saw The Goelan and prize in company; he then went below, and saw them no more. La Pique could easily have come up with The Goelan and prize; he considered the prize under protection of The Goelan. Five days after, the captain of The Goelan told him, that, in consequence of La Pique's heaving in sight on the 1st January, he was obliged to run considerably to leeward to take possession of The Minerva. Upon this statement of evidence, there could be little doubt the capture was postponed for a considerable time, with the intention of defrauding the joint captor; and, upon the authority of what had fallen from the court below, in the cases of The Robert,¹ Sirius, and Waaksamheid,² the court would feel it imperatively its duty to defeat the injurious effect of such a fraud. And taking the facts of the case as (if no such fraud had been interposed) they * in all probability would have been, would [*115] affirm the sentence pronounced in favor of the joint captor.

King's Advocate and *Carr*, for the appellant, contended the asserted joint captor's case had not been sufficiently made out: more particularly, as it had been repeatedly decided, a claimant under such circumstances could only recover by the strength of his own case. The proof, therefore, should be very strong indeed, to induce the court to pronounce for an asserted interest where the most positive oaths of several witnesses established the fact, that this vessel was not, nor, indeed, could not, be in sight at the time of capture. Such was the testimony of the master, mate, and supercargo of the captured vessel. The second ground upon which these parties had founded a claim was, that of a mere accidental view of this capturing vessel and prize during a part of the day in the evening of which the capture was made. It never had yet been determined, that obtaining sight of even a chase under such circumstances would entitle a vessel as joint captor. There must necessarily be proved either a joint chasing, a coöperation, or an assistance afforded to the actual captor by the presence and proximity of the asserted joint captor. None of these circumstances formed part of the case of this vessel as detailed in the evidence. La Pique had steadily maintained her course, which was said to be from the Spanish main to the port from whence these two vessels had a short time before departed, and having

¹ 3 Adm. Rep. 194.² 3 Ibid. 1.

The Minerva. 2 Acton.

merely exchanged signals with The Goelan, bore direct for Port Royal. What had been said by one sailor, that La Pique was at one time within three miles of the prize, and might easily [*116] have borne down on her, was consistent enough, as * the prize was leaving that harbor to whch the other was directing her course. This accounts for the contradictory nature of some of the evidence in this cause; as it for a time appeared as though La Pique was in pursuit. From the nature of her course it might have appeared so, but there is no ground to believe any such thing was in contemplation; neither was it natural to conclude this vessel, just coming out of Port Royal, and accompanied by a king's ship, could have been an enemy. There was equally as little foundation for the imputation against the captor, of having wilfully postponed the capture for the purpose of securing a prize exclusively to himself. It was not pleaded in the allegation, that it was the duty of The Goelan to have hoisted a signal of an enemy in sight. The conversation alluded to by the purser of La Pique was totally undeserving of credit; first, as it was the evidence of a releasing witness, unsupported by any other witness, although he admitted a lieutenant was then present; and next, as it was impossible the captain of The Goelan must not have been aware of the danger he incurred by any such avowal, without the possibility of obtaining thereby a countervailing advantage. It never, however, could be maintained, that the officers of his Majesty's navy were bound to publish their suspicions of the property of any unarmed vessel they might probably have an intention of examining, or were even proceeding to examine; it would be attended with no public utility, and would impose a great hardship and loss upon his Majesty's cruisers. For the following, among other, reasons it was urged the court would pronounce for the appeal :

Because La Pique was not in sight at the time of capture; and had not manifested any disposition to chase or examine the prize in question :

[*117] * Because the suggestion of a wilful postponement of seizure is unfounded, and would not, if true, support the legal consequences that have been attributed to it on the part of La Pique.

Addams, in reply, stated, that by the confession of all parties, the prize had been within the reach of The Goelan, so that at any period of the afternoon he might have taken possession of this ship. The postponement was, therefore, established, with what intention must be obvious. Watson had distinctly said, La Pique had left off

The Minerva. 2 Acton.

chase as soon as she distinguished The Goelan's signal. The fact being established that she was in chase, it was impossible not to presume that this vessel, being a king's ship, was then as well as at all other times actuated with the *animus capiendi*. King's ships were, therefore, in such a case entitled to share merely on the circumstance of sight; for, by being in sight alone, they conveyed that constructive assistance and intimidation necessary to found a claim. The only limitation to this rule arose from the circumstance of the ship so being in sight either being in a state which rendered it impossible she should render any assistance, as by having her sails on shore, &c., or by a wilful discontinuance of the chase, without being induced thereto by any act or omission by the principal chasing vessel. There can be little doubt what was the intention of La Pique in chasing, or what impression The Goelan's signal must have made on her, so as to induce her to discontinue chasing; it must have conveyed the idea to La Pique's commander, that there was no suspicions entertained of the prize. It would be for the court to determine how far such a representation by one king's ship to another was consistent with the public service, and whether in [* 118] such circumstances he should not have communicated the signal of an enemy or a suspicious sail.

On the fact of sight, at the moment of capture, it was necessary to observe, that in point of law, the effect was the same, whether a cruiser kept close by a suspicious sail so as to secure the possession when he pleased, during which postponement of reducing the prize into actual possession another cruising vessel continued in sight; or actually boarded her in her sight. It, at least, was The Goelan's duty to take immediate possession; the postponement was contrary to the practice of his Majesty's ships; and where no other reasons than fraud could be assigned for such neglect it is the duty of the court to interpose, and defeat the fraudulent intention.

SENTENCE —

Pronounced for the appeal, reversed the sentence appealed from, so far as pronounced for the interest of the commander and crew of La Pique, as joint captors of the prize; and pronounced the same to have been captured by his Majesty's brig, Goelan, alone.

[*119]

* THE *REBECCA*, M'Neil, master.

July 18, 1811.

Interference in the close trade of the enemy's colonial establishment. Case of a neutral taking in a cargo at Batavia for account of the Batavian government, and entering into an engagement to carry the same with three persons in a civil capacity, to Decuma, a Dutch factory at Japan, with a proviso, that should war break out between the Dutch and her government she should be free from capture or detention on her return; and that on her part she should do her utmost to protect and safely convey the property to its destined port. Held to be in violation of the orders of January 7, 1807, and 11th November, 1807, and a departure from the neutral character.

THIS ship sailed from Baltimore to Batavia, and, after her arrival there, was chartered by the Dutch government on the 17th of April, 1809, for the purpose of transporting a cargo from thence to Japan and back, and, being laden with a valuable cargo of sugar, coffee, spices, &c., sailed under American colors for Decuma, a Dutch factory in the island of Japan, and was captured in the prosecution of such voyage, on the 24th of May, 1809, and carried to Calcutta, where the usual proceedings were instituted.

The cargo being admitted to be Dutch property was, of course, condemned.

The judge also rejected the claim of the supercargo for the ship as the property of Messrs. Smith and Buchanan, and Messrs. Hollins and M'Blair, of Baltimore, and pronounced "the ship to have been taken in the prosecution of an unlawful voyage between the Dutch port of Batavia and the Dutch factory at Decuma, in Japan, in violation of certain orders, issued by his Majesty in council on the 7th of January, 1807, which forbid neutrals to trade between the ports of his Majesty's enemies, and also as having been taken in prosecution of an unlawful voyage from the Dutch port of Batavia, in violation of certain orders issued by his Majesty in council on the 11th of November, 1807, which forbid neutrals to trade from the colonies of the enemy; and also as having been, by nature of her employment in the voyage, incorporated into the Dutch commercial marine, and during such employment, having become a Dutch ship," from which sentence, so far as related to the condemnation of the ship, and the refusal of freight, the claimants appealed.

The *King's Advocate* stated the captor's case. This vessel had

The *Rebecca*. 2 Acton.

long been engaged in the trade from Baltimore to Batavia, supplying that colony with necessaries, wine, and dry goods. In the outward voyage the cargo consisted almost entirely of flour. From her intimate connection, therefore, with this colony, she had been considered as eligible to be intrusted with that part of the trade of the colony, which for ages it had guarded with the most scrupulous jealousy ; and which nothing but the extreme difficulty Dutch vessels had experienced in eluding British cruisers, could have induced the Batavian government to intrust to strangers. An agreement by charter-party for this purpose was entered into between the director-general of the royal finances and revenues in Asia, under the express authority of the governor-general Daendels and Mr. Higginbotham, the supercargo, who appeared, by the letters of instruction, to have a discretionary authority over the concerns of this vessel, although nothing in those letters pointed to any such expedition as that in which the vessel subsequently engaged. Several articles of this charter-party which had been drawn up with extreme caution and minuteness were altogether exceptionable and perfectly irreconcilable with the character and conduct of a strict neutrality. By the terms of the contract this vessel was "hired for and on account of the governor-general in India, for the purpose of completing a voyage from Batavia to *Japan, and back to Souza Caya, for the [*121] sum of \$35,000, to be paid not in specie but in Batavia produce to that amount ; the supercargo binding himself and the officers of the said ship to adhere in every respect to the instructions of the Dutch government in the prosecution of this voyage, the freight-money to be paid after the said ship should be moored in the roads of Souza Caya ;" the government to have a right to send with this ship at most three persons employed in a civil character to and from Japan ; the ship to be free from anchorage-money at her return to Souza Caya, and also all similar charges on her arrival at Japan ; as those charges were to remain for account of the Dutch government. By another article it was further stipulated ; "That if, after the signing of these agreements, and before the same on the side of the second signer (namely, the supercargo) be completed, it should appear that the United States of America were involved in a war with the kingdom of Holland, or any of her allies, the said ship *Rebecca*, and any thing belonging to her, by her return to this island, shall not be considered as an enemy ; and the second signer, although such a war should exist, shall always be entitled to the full freight-money stipulated by article first, nor shall any injury or molest be done to the said ship, or any persons belonging to her, during her stay in the harbor or roads of this island, or by her departure from

The Rebecca. 2 Acton.

here; nor shall the said ship on her departure from here be liable to be captured by any ship or ships of this colony, during her passage in the Indian Seas, but to the contrary, every assistance shall be given to the same, even as in time of peace. The second [*122] signer * binding himself in the meantime, that if in case he, during the voyage, should have information that such a war had taken place, the ship, notwithstanding all that, shall return to the place of her destination, and that by avoiding meeting any ships every exertion will be done to the benefit and interest of his employers." This last stipulation must affect the ship, as it stripped her of all her national character, and insured to this vessel the advantages of a new character in the event of a war breaking out, which was then very generally expected in that part of the globe. She was to be exempt from the operation of supervening hostilities; not only she relinquished her national character with respect to Holland, but even stipulates to renounce her duty to her own government, by endeavoring to avoid other vessels in order to secure the property of the open enemy of her own nation and government. Thus the abandonment of her national character by her agent's own act, was in all respects complete. The stipulations and concessions made by the Dutch government proved that government considered the abandonment complete; and, as a matter of course, every advantage a Dutch ship could have had upon such a voyage, it appeared, were granted to her also, and she became in effect a Dutch vessel, with all the immunities and privileges of such vessels in those seas.

The nature of the voyage itself was also a sufficient ground of condemnation. The order of the 7th of January, 1807, had interdicted a trade by neutrals between ports of his Majesty's enemies, or ports so far restricted by those enemies as that British vessels might not freely trade thereat. Hence a trade between Batavia, [*123] an enemy's port, and Decuma, a factory of the enemy, *in Japan, which no British vessel would be permitted to enter, was clearly within the meaning of this order. A subsequent order, issued the 11th November, the same year, enlarges the prohibition; and, amongst other places, declares all ports of the enemy's colonies subject to those restrictions, in point of trade and navigation, as if the same were actually in a state of blockade, with certain exceptions, none of which exceptions were at all applicable to the case of this ship; the voyage outwards being direct between two ports in the colonies, and the return voyage to another port of Batavia.

The appeal for freight was resisted on the ground that, as the freight had been agreed to be paid on the return of the ship, which, in fact, never took place, the capture being made on the outward

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voyage, no freight-money had been earned. The reasons for condemnation were :

1st. Because the trade was in violation of his Majesty's orders in council.

2dly. Because the ship is liable to be condemned as a Dutch vessel, being taken as in prosecution of a voyage from a Dutch settlement to a Dutch factory in Japan, under affreightment to the Dutch government, for the special protection of the Dutch trade, and for the conveyance of the officers of the Dutch government who were on board.

And as to the appeal against the refusal of freight.

3dly. Because it appears, by the charter-party, that no freight was to be paid on the event, which happened, of the vessel being captured before her return to Souza Caya.

Dallas and *Adams*, for the claimants. By the sentence of the court below, it appears the judge proceeded * to condemn this vessel upon these following grounds : First, on the order of 7th January, 1807 ; secondly, on that of 11th November, 1807 ; thirdly, on the adoption of this vessel into the Dutch marine ; and lastly, on the stipulation to convey and the actual conveyance of certain persons, in an official civil character, to Japan. The discussion of these several grounds for condemnation will prove one of considerable nicety, and the subject altogether novel, and for perspicuity each shall, in their order, be examined distinctly and apart. The order of the 7th January prohibits a trade by neutrals between ports of his Majesty's enemies, or with ports so far under their control as that British vessels may not freely trade thereat. Here one of the ports is a Dutch port, but the other a port of the empire of Japan, therefore not within the order ; neither can the latter be considered a port over which the enemy has such a control as excludes British vessels. The prohibition has long subsisted, and is the act of the Japanese government, not of the enemy. The restriction, therefore, does not amount to an interposition in the war, by shutting out the British. It extends equally to all other European nations, and is merely a peculiar privilege granted to the Dutch, which existed previous to, and probably will exist subsequent to, the present war. This description of trade (even supposing the order was intended for any other than European ports) is not, therefore, within the meaning of this order.

The order of 7th November, imposing a blockade on the ports of France and her allies, or any country at war with his Majesty ; ports in Europe from which the British flag is excluded, and colonial

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ports, cannot apply to this description of trade. These two [*125] ports * are not ports of France, her allies, or his Majesty's enemies, nor ports of Europe from which the British flag is excluded. Neither can they be comprehended within the meaning of that part of the order prohibiting trade with ports in the enemies' colonies. Whenever doubt exists as to the meaning of terms, it is a useful rule that such should be considered with reference to the subject-matter. The common acceptation of the term colony is very vague, and sometimes is used to express most descriptions of foreign establishments; but the idea annexed to it by the different nations of Europe, in their disputes respecting the trade of their colonies, is sufficiently precise and determined. Where mention is made of a colony, it is always understood to be a settlement possessed of a civil government, a military force, and the means of maintaining by force a prohibition to trade there in time of peace. The avowed purpose of an European government is to make a nominal blockade in its colonies amount to an actual blockade. The national character of Batavia, with reference to these points, has been already determined by the judgment delivered in *The Patapsco*, Hall,¹ not to be of so close a colonial nature. And it will require little investigation to discover, that the settlement or factory at Decuma has no pretension to any such distinction or consideration. There the Dutch have never possessed any regular government or force, erected there any fort, or obtained from the Japanese government any grant of the soil. Travellers unite in describing this situation as one of the most irksome and humiliating in which Europeans could possibly be placed. The trade thither by the Dutch is periodical. On the arrival of these vessels, they are compelled to deliver up [*126] all their arms and ammunition, * which are not returned until the day previous to their departure. These precautions and restrictions are the natural effects of the Japanese jealousy, which does not permit strangers to learn even their language. Whatever political regulations, therefore, are here established, they are part of the policy of the Japanese government, and not those of the Dutch. The exception in favor of the Dutch has for its object the importation of their merchandises, which are paid for in the produce of Japan; and the extraordinary profits derived from this trade have induced the Dutch to submit to the most rigorous restraints, in order to keep it.² From such facts it must be inferred, that the Dutch have merely a permission to trade to this particular port, and their

¹ Prize Appeal Cases, 270.

² *Montesquieu's Esprit des Loix*, liv. xx. c. 9.

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establishment there (if such it may be called) cannot with any propriety be denominated a colony. It is equally obvious that, as the prohibition continues in force not only against his Majesty's subjects, but also all other European nations, the Dutch excepted, it is not within either the terms or spirit of the order.

The third ground assigned for condemnation by the judge below involves a question of the greatest magnitude to both neutral and belligerent nations. For the first time it has been decided that a neutral in a permitted port may not enter into a contract to take on board innocent articles, and navigated by her own master and crew, her papers fully and accurately avowing the nature of the property on board, depart for another neutral (or at least not prohibited) port. There is no case to prove such ship should be considered an enemy's ship, or adopted into the enemy's marine. In the early cases reported in the Admiralty Reports, where the court considered the property * liable to confiscation, the sentence proceeded [* 127] either upon the fact of the vessel's having continued after a declaration of war in the habitual trade of the enemy, navigated by an enemy's master and crew, as in the case of *The Vigilantia* ;¹ or upon the circumstance of a transfer being made of such vessel to a neutral during a war, and yet continuing in her former course of trade from and to the enemy's port.² But neither these cases, nor any other reported,³ contain the doctrine that a neutral vessel, fairly and openly chartered to the enemy under the flag and pass of her own country for a particular voyage, is to be considered adopted into the enemy's navy. Nor can the stipulation entered into, that in the event of a war breaking out between France and America this vessel should be exempt from its operation, be strained so far as to infer that such a vessel was actually adopted by the Dutch government, it amounted to no more than a stipulation of honor and good faith ; and the American owner or agent was justified in adopting a system of reciprocity, by stipulating to endeavor to protect the Dutch property on board by all fair and honorable means.

Finally, the passengers found on board are not persons invested with such a character as can affect the property of these claimants. One appears to have been the agent appointed by the Dutch government, to superintend the sale of this property. Some inconsistency is certainly observable in the accounts given of this gentleman by the different witnesses who speak to this point. The supercargo says this Mr. Creitoff went out as governor, Belmore as pilot, both

¹ 1 Adm. Rep. 1.

² Embden, Meyer, Ibid. 16.

³ Eendraught, Broetjas, Ibid. 19.

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were Dutchmen ; but the witness states he knows nothing of their commission. The mate states his belief that Creitoff was [*128] going as resident to Japan ; he also knows of *no commission. Belmore was put on board to pilot The Rebecca to Japan and back. Both these witnesses agree in stating neither of these passengers had any concern, directly or indirectly, in the ship or cargo. The second mate states more explicitly that the Dutch government were the laders and owners of the cargo ; it was consigned to Mr. Creitoff, passenger on board, who was going to Japan, as agent for the Dutch government. He had some private trade on board ; was a writer in the Dutch service, and went to be resident and agent at Japan ; had no authority over ship or cargo, except as eventual consignee of the cargo. Both these persons were necessary to protect the interest of the laders of the cargo ; one as pilot, the other as agent to transact their business at Japan and ship a return cargo. Whether he was to have remained at Japan after this duty had been fulfilled, or return with the vessel, will be immaterial. As far as he is concerned with this transaction, he appears unquestionable in a commercial character, and, as such, he is recognized in that article of the charter-party, which stipulates that the government shall have the privilege of " sending one, two, or, at most, three persons, employed in a civil character, with this ship." The case, therefore, before the court is one of complete novelty. No case has ever yet occurred where persons found on board in the employment of the enemy, purely in a civil capacity, have induced condemnation of this ship. The transportation of persons in the military service of the enemy has long been decided to be an interposition in the war, affecting the ship with the penalty of confiscation. By referring to the three principal cases in which this principle has been recognized, it will be found that in none of them¹ did it appear the persons so carried had any collateral employment with the [*129] *ship or its cargo. The facts spoke strongly, and the attention of the court was at once fixed by the discovery, that the transportation of those persons was the chief purpose of the expedition, however it might be colored with the semblance of a mercantile transaction. In the case of The Carolina, 150 dragoons had been transported to Alexandria. In The Friendship, the judge, in pronouncing condemnation of the ship, observed there were but a few goods on board, and those of little value ; but her actual cargo was of another kind, and concluded the vessel had no commercial

¹ Carolina, 4 Adm. Rep. 256 ; Friendship, 5 Ibid. 420 ; Orozembo, 6 Ibid. 430.

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character belonging to her, that could be said to arise out of the nature of her lading. These cases bear no resemblance to that before the court. Here is a very valuable cargo on board; the conduct of the vessel strictly commercial; the connection between these two persons on board and the cargo perfectly consistent with the course of trade in which the vessel is found engaged. It is a question of the most serious import whether a vessel fairly chartered for a voyage from a permitted to a permitted port, without any attempt at falsehood, fraud, or the introduction of contraband, (proceeding on such voyage,) shall be subjected to the penalty of confiscation merely from the circumstance of two persons being found on board, neither of a military or political description, but acting as the agents of the Dutch East India Company, in whose service, it appears, the principal was merely a writer or subordinate officer in a civil department. In the case of The Orozembo, a somewhat different opinion appears to have prevailed in the mind of the learned judge below. There some military persons, and two others intended to be employed in civil capacities in the government of Batavia, were found on board that vessel. The learned judge, speaking of the [*130] latter, said: "Whether the principle would apply to them alone, I do not feel it necessary to determine; I am not aware of any case in which that question has been agitated; but it appears to me a principle to be but reasonable, that whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations." However unfavorable this passing opinion appears to be, the circumstances of this case render it inapplicable; for here it does not appear the carriage of these two persons to Japan was the primary object. A valuable cargo is found on board, the charge of which is intrusted to them in their several capacities. They are, therefore, to be considered solely in the light of persons employed in a course of trade fairly and avowedly. Our belligerent rights permit neutrals to trade with and from the enemy's ports, by the ordinary mode of their commerce prior to hostilities. Can it be considered a deviation from the ordinary mode, that these commercial agents are carried out to protect a valuable cargo upon the voyage, and dispose of it to the best advantage? Connected as they are with that cargo, they should be considered a mere appendage thereto; especially as it has been shown that at Japan there actually is neither civil or military government to administer, on the part of the Dutch residing there.

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King's Advocate replied — That it appeared to the court, [*131] during the argument in the case of *The Cora*,¹ * that the terms of the order of 7th January, 1807, would apply to ports in the Indian Seas as well as in the West Indies. The order was intended to prohibit all that species of trade between ports whence British vessels were excluded, and in which British ships could not participate. The order of the 7th January not being considered sufficiently comprehensive in its terms and operation, that of the 11th November, 1807, followed, ingrafted on the preceding order, to render it general to the world. The same policy which dictated the first produced the second ; and should, therefore, guide its interpretation. Nor was the trade less objectionable, as to the national character of these two ports. Batavia being a colonial port of the enemy, and Decuma a close factory of the enemy in Japan, where this cargo was to be delivered to a Dutch governor, for account of the Dutch government, and not for general or public sale. The factory or settlement at Decuma was as much under the control of the Dutch government, as if the Dutch had possessed the territory for fifty miles round it. The arguments used by counsel to show that these ports were not colonial ports, proceeded on the assumption that the order was to be taken in its strictest sense, whereas the order was retaliatory, in consequence of the French decree ; which vessels coming from Bombay, though not strictly within the meaning of the terms British isles or colonies, were considered to have violated. The same policy governed the order of 26th April, 1809, and showed most explicitly the intention of his Majesty's government to interrupt all trade of this description. It would, therefore, be quite indifferent whether Decuma was a colony or not ; for this [*132] vessel should have gone to her own ports from * Batavia.

There could be no doubt as to the adoption of this vessel into the Dutch navy, for she had been engaged in the service, not of an individual, but of the government itself, placed under the direction of two Dutch officers, in different capacities, and actually had on board Dutch colors, to be used, as it was said, as signals, on her arrival at Japan. If any thing were wanting completely to denationalize her, it was evident the agreement contained in the charter-party must have that effect, namely, that she should be exempt from the effect of supervening hostilities. This was a stipulation that could only be made by the government itself, and was, therefore, an actual adoption by that government. By this stipulation the American

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interest was to be sacrificed, her national character relinquished, and, in the event of hostilities, the vessel was to betake herself to the purposes of the enemy. This, then, was the criterion of adoption. Had war broken out before her return, no doubt it would have been between France with Holland, and America with Great Britain. Under such circumstances, how culpable a breach of national faith would the conduct of this vessel have exhibited, had she returned back with this cargo to Batavia. In the absence of direct authorities on this subject, reference should be had to the case of the Dutch fishing vessels, and De Coning's case. The carrying out the governor and another public officer was, in itself, sufficient ground of condemnation, being no less than a coöperation in the hostile purposes of the enemy. Counsel or skill were equal, or perhaps more advantageous to the enemy, than courage or absolute force. How these persons came to be carried out could only have been explained by the master's declaring himself ignorant of their situation in life; but it was absurd, *indeed, to suppose the incidental [*133] circumstance of this vessel's carrying out a cargo, for account of the same government, could alter the principles of law which must be applied to this case, and induce the court to restore property impeached on so many valid grounds.

SENTENCE.

The court pronounced against the appeal, and affirmed the sentence of the court below, condemning the ship as lawful prize to the captor.

LYDIAHEAD, Stanwood, master.

July 25, 1811.

Upon an order for further proof, as to particular grounds for condemnation, the court will not permit counsel to argue for condemnation upon a fresh ground of impeachment, although disclosed in the further proofs exhibited by the claimants for restitution. The further proof being only a subject of investigation, as to the specific points in respect to which the court had required explanation.

THIS was a case of further proof. Upon the production of the further proof, it was confidently suggested, by the captor's counsel, that a fresh and sufficient ground for condemnation of the property was disclosed from some of the papers produced. A question, there-

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fore, arose, whether the further proof being ordered by the court, expressly with respect to the property and destination back, the property might now be impeached upon this new ground.

Stothard, for the captor, stated this was a case of a vessel going from Marseilles to Gallipoli, without avowing such destination in her papers, and captured returning, as asserted, to Copenhagen. The course of her former voyage rendered her liable to confiscation on her return, according to the provisions of the orders in council, November 11th, 1807. When formerly before their lordships, the case had been ordered to further proof; the further proof now disclosed a fresh ground of condemnation.

[* 134] * *Dallas*, for the claimant, objected that the order of the court referred merely to the production of further proof, as to property and destination on the return voyage; the captor's counsel could not, under these circumstances, go back and open the case anew.

Stothard contended that, as the farther proof disclosed she had gone to Gallipoli on the voyage out, without allowing our cruisers to ascertain she was bound to Gallipoli, and, therefore, under false papers, the property might very fairly be impeached upon evidence which never would have been brought to light, had it not been for this very order of court for farther proof. According to the principles laid down by the court below in the case of *The Rendsborg*,¹ the ship's papers should have disclosed the fact, and the parties have acted *bona fide* throughout the transaction, to entitle it to any favorable consideration. It would be therefore inequitable to exclude the captors from the benefit of a disclosure made by the claimants whilst endeavoring to serve their own interests.

BY THE COURT.

SIR W. SCOTT. I conceive you are restricted from entering into this question.

SIR JOHN NICHOLL. What do the facts disclosed prove ?

Stothard. The further proof contains extracts from the logs, which prove that the actual destination outward was not disclosed in the ship's papers.

¹ 4 Adm. Rep. 121.

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* *Dallas.* All this has been already the subject of in- [*135] vestigation. On the former hearing it was attempted to show there was such a trading at these ports as brought this vessel within the meaning of the order alluded to. The nature and spirit of the order was then argued, and every part of the case discussed at considerable length. The court determined upon the whole of the facts, and arguments advanced, and directed further proof to those points alone which appeared to require elucidation, namely, the proof of property, and the asserted destination back to Copenhagen. The farther proof now before the court can only be referred to in explanation of these topics.

JUDGMENT.

SIR WILLIAM SCOTT. You cannot now, after the court has heard counsel at length, when this subject should have been regularly brought before the court in the first instance, be permitted to impeach the vessel upon a new ground. The direction for farther proof is specific, and the court will act in conformity thereto. You are not at liberty to open the case again, but must confine your objections to those points which the order of the court has already pointed out as the proper subjects of investigation.

Application refused.

APPENDIX.

ORDERS, NOTIFICATIONS, INSTRUCTIONS, &c.

WHEREAS the Marquis Wellesley, one of his Majesty's principal secretaries of state, hath, in his letter of the 12th instant, signified to us the king's pleasure, that we do give the necessary orders to the officers employed in the blockade of the coast and ports of Spain, from Gijon to the French territory, that they permit, notwithstanding the said blockade, Spanish or neutral vessels laden with cargoes the produce of Spain only, to sail from any port included in the limits of the said blockade, subject, nevertheless, (as to the ports with which they trade,) to the restrictions of his Majesty's order in council of the 26th April, 1809, and of the 7th January, 1807. We do, in pursuance of his Majesty's pleasure, signified to us above mentioned, hereby require and direct your lordship to give the necessary orders to the respective captains, commanders, and commanding officers of his Majesty's ships and vessels under your command accordingly.

(Signed)

J. BULLER.

W. DOMET.

R. MOORESM.

To Admiral the Right Hon. Lord Gambier, &c., &c., &c.

ORDER. February 8, 1811, containing order 20th June, 1810, prohibiting the exportation of iron, hemp, and other ship stores.

ORDER. February 8, 1811, containing order 16th May, 1810, prohibiting exportation of gunpowder, arms, &c.

ORDER. February 8, containing order June 20th, 1810, regulating importation of hides, skins, horns, tallow, &c.

At the Court at Carlton House, the 28th February, 1811; present, his Royal Highness the Prince Regent in Council.

WHEREAS vessels under divers flags have proceeded under his Majesty's license from ports of the United Kingdom for Gottenburgh, and certain ports and places in the Baltic, where, owing to circumstances which have intervened, they may not be able to deliver cargo.

* And, whereas, it is expedient to enable the said ships to return [* 2] with their cargoes to the ports of the United Kingdom, it is hereby ordered by his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, that all ships as aforesaid, which shall put themselves under the convoy of his Majesty's ship Pandora, or of any other of his Majesty's ships which may receive instructions to convoy the same to the ports of the United Kingdom, shall be permitted to return to the said ports, and to receive their freight, and to depart, without molestation, to a port not blockaded, after the delivery of their cargo.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

(Signed)

W. FAWKENER.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

MR. FAWKENER having, by his letter to our secretary of the 25th instant, represented to us, by direction of the lords of his Majesty's most honorable privy council, that it had been deemed expedient to make an alteration in the terms of the licenses permitting vessels to trade to and from this kingdom, so far as relates to the character of such vessels and the flag under which they shall be allowed to sail; but that the lords of the council are of opinion that it will be expedient that general directions should be given that his Majesty's ships and privateers do not molest vessels furnished with the former licenses, provided the same shall be dated previous to the 20th of last month, although such vessels may belong to persons or places excepted in the new form of license, and provided also that the terms and conditions of such licenses shall have been duly complied with. We send you herewith a printed copy of Mr. Fawkener's said letter, and also of the form of license therein referred to, and do hereby require and direct you to cause all persons who already have, or may hereafter take out, from the High Court of *Ad- [* 3]

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miralty, letters of marque, to be furnished with copies thereof for their information and guidance.

Given under our hands the 2d day of March, 1811.

R. BICKERTON.

JAS. BULLER.

W. DOMETT.

To the Right Honorable Sir William Scott, judge of the
High Court of Admiralty.

By command of their lordships,
JOHN BARROW.

—

Council Office, Whitehall, 25th February, 1811.

SIR,—It having become necessary, in consequence of the recent annexation to France of Holland, of the Hans Towns, and of certain other towns and territories, that an alteration should be made in the terms of the licenses, permitting vessels to trade to and from this kingdom, so far as relates to the character of such vessels, and the flag under which they shall be allowed to sail; I am directed by the lords of his Majesty's most honorable privy council, to transmit to you for the information of the Lords Commissioners of the Admiralty, the inclosed form of license so altered; their lordships will observe, that instead of the words heretofore used, namely, "a vessel bearing any flag except the French," the following exception has been introduced, namely, "a vessel sailing under any flag except that of France, or except a vessel belonging to France or the subjects thereof, or belonging to the subjects of any territory, town, or place annexed to and forming a part of France." This new form of license, therefore, will not protect a vessel bearing the French flag, or belonging to France, or to any of the territories, towns, or places, which have been annexed to France; but in consideration of the number of vessels belonging to those territories or places, or sailing under their respective flags, which have already commenced voyages under the former licenses, and which in consequence of this alteration might now be liable to detention; the lords of the council are of opinion that it will be expedient that general directions should be given by the Lords Commissioners of the Admiralty to the commanders of his Majesty's ships of war and privateers not to molest vessels furnished with the former licenses, provided such licenses shall be dated previous to the 20th of this instant February, (the day on which it was

[* 4] judged necessary to adopt the alteration above alluded to,) * although such vessels may belong to persons or places excepted in the new form of license; and provided also that the terms and conditions of such licenses shall have been duly complied with.

I am to add, that the alterations contained in the form of license herewith

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v

transmitted, will be introduced into all licenses where the name of the vessel is not inserted in the body of the license.

I am, sir,

Your most obedient humble servant,

W. FAWKENER.

J. W. Crocker, Esq.

*At the Council Chamber, Whitehall, the present,
the Lords of his Majesty's most Honorable Privy Council.*

WHEREAS there was this day read at the board the humble petition of
It is ordered in council,
that a license be granted to the petitioner for permitting

bearing any flag except that of France, or except a vessel belonging to France, or to the subjects thereof, or belonging to the subjects of any territory, town, or place annexed to and forming a part of France, to import direct from any port in Norway, Sweden, or Denmark, without the Baltic, not under blockade, to any port of this kingdom, or to sail in ballast from any port north of Tonningen

to any port of Norway, Sweden, or Denmark, without the Baltic, not under blockade, and in either case to import from thence a cargo of grain, (if importable according to the provisions of the corn laws,) and such goods as are permitted by law to be imported (except spirits, lobsters, stock-fish, or fish-oil) to any port of this kingdom :

the master to be permitted to receive his freight, and depart with his crew and vessel to any port not blockaded,

notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property * may appear to belong ; upon [* 5] condition that the name and tonnage of the vessel, name of the master, and time of her clearance from her port of lading, shall be indorsed on the said license, and that if the cargo be destined for Ireland, the vessel shall sail north about ; but if any part of the import cargo of the said vessel consist of naval stores, and be destined for any port of this kingdom lying to the south of the port of Hull, the vessel shall, unless under the protection of convoy, stop at Dundee or Leith, and there obtain a fresh clearance for the port of her destination ; and upon further condition, that the said vessel shall not sail from Dundee or Leith without convoy, and shall proceed with such convoy, and not desert the same, till her arrival at the port of destination, or

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as long as such convoy shall be instructed to protect her. Such license to remain in force for four months from the date hereof. Provided always, that at the expiration of the said period, or sooner, if the voyage be completed, the original license shall be deposited, according to the place of importation, with the commissioners of his Majesty's customs at the port of London, or with the collector of the customs at the outports, to be by such collector transmitted to the commissioners for their directions thereon; and that no person shall take any benefit under the said license for the purpose of admitting to entry any ship or cargo, in any manner to which they would not otherwise be entitled before the said license shall have been so deposited, and the order of the said commissioners shall have been had thereon. And the right honorable Richard Ryder, one of his Majesty's principal secretaries of state, is hereby specially authorized to grant such license, in case he shall see no objection thereto, annexing to such license the duplicate of this order herewith sent for that purpose.

ORDER. March 28, containing the order, May 16, 1810, for supplying the colonies in North America and the East Indies, with a form of a license.

ORDER. March 28, continuing the order, April 10th, 1810, prohibiting the exportation and regulating the importation of corn and provisions.

[* 6] * In the name and on behalf of his Majesty.
GEORGE P. R.

Instructions to the Commanders of his Majesty's ships of war and privateers.

Given at his Majesty's Court at Carleton House,
the 13th day of April, 1811, in the fifty-first
year of his Majesty's reign.

Our will and pleasure is, that his Majesty's instructions of the 4th February, 1807, whereby the importation of cargoes, consisting of the articles therein-after enumerated, coming to any port of the United Kingdom (provided they should not be coming from any port in a state of strict and rigorous blockade,) was allowed, shall be henceforth revoked and discharged.

By the command of his Royal Highness the Prince Regent,
in the name and on the behalf of his Majesty.

(Signed)

R. RYDER.

ORDER. July 19th, continuing order Feb. 8th, prohibiting exportation of ship's stores, &c.

ORDER. July 19th, continuing order Feb. 8th, prohibiting exportation of gunpowder, arms, &c.

ORDER. July 19th, continuing order Feb. 8th, regulating the importation of hides, skins, &c.

At the Court at York House, the 6th of September, 1811; present, his Royal Highness the Prince Regent in Council.

WHEREAS by an act made and passed in the forty-sixth year of his Majesty's reign, entitled "An Act for authorizing his Majesty in Council to allow, during the present War and for six months after the Ratification of a definitive Treaty of Peace, the Importation and Exportation of certain Goods and Commodities in neutral Ships into and from his Majesty's Territories in the West Indies and Continent of South America ;" it is enacted, that from and after the passing of the said act, it shall and may * be lawful for his Majesty, his [* 7] heirs and successors, by and with the advice of his and their privy council, to permit or to authorize the governors of the said islands and territories, in such manner and under such restrictions as to his Majesty, by and with the advice of his privy council, shall seem fit, to permit, when the necessity of the case shall appear to his Majesty, with the advice of his privy council, to require it, from time to time, during the present war and for six months after the ratification of a definitive treaty of peace, the importation into and exportation from any island in the West Indies, (in which description the Bahama islands and the Bermuda or Somer islands are included,) or any lands or territories on the continent of South America to his Majesty belonging, of any such articles, goods, and commodities as shall be mentioned in such orders of his Majesty in council, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, in such manner as his Majesty, his heirs and successors, by and with the advice aforesaid, shall direct ; whereupon certain orders of council were made on the twelfth day of April one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, the tenth day of January, one thousand eight hundred and ten, and the seventh day of February, one thousand eight hundred and ten ; which orders were made to continue in force for a limited time : And whereas it appears at present to be necessary to permit for a further limited time, subject to be sooner terminated, varied, or altered, as is hereinafter provided, the importation into and exportation from the islands and territories of his Majesty in the West Indies, (including the Bahama islands and the Bermuda or Somer islands,) and

the lands and territories on the continent of South America to his Majesty belonging, of certain articles, goods, and commodities hereinafter mentioned, in ships or vessels belonging to the subjects of any state in amity with his Majesty ; his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, is thereupon pleased, by and with the advice of his Majesty's privy council, to order, and it is hereby ordered, that the said orders of council made on the twelfth day of April, one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, the tenth day of January, one thousand eight hundred and ten, and the seventh day of February, one thousand eight hundred and ten, shall continue and be in force until the thirty-first day of December, one thousand eight hundred and twelve, (except

[* 8] as is hereinafter * excepted with respect to salted, dried, or pickled fish,) and that from and after the first day of December, one thousand eight hundred and eleven, it shall be lawful for the governor or lieutenant-governor of any of his Majesty's islands in the West Indies, (in which description the Bahama islands and the Bermuda or Somer islands are included,) and of any lands or territories on the continent of South America, to his Majesty belonging, to permit until the thirty-first day of December, one thousand eight hundred and twelve, subject to be sooner terminated, varied, or altered, as hereinafter provided, in ships or vessels belonging to the subjects of any state in amity with his Majesty, the importation into the said islands, lands, and territories respectively, of staves and lumber, horses, mules, asses, neat cattle, sheep, hogs, and every other species of live stock, and live provisions, and also of every kind of provisions whatsoever, (beef, pork, and butter excepted, and from and after the first day of July, one thousand eight hundred and twelve, salted, dried, and pickled fish also excepted,) and also the exportation from the said islands, lands, and territories respectively, into which such importation as aforesaid shall be made, of rum and molasses, and of any other goods and commodities whatsoever, except sugar, indigo, cotton, wool, coffee, and cocoa : Provided always, that such articles so to be imported, except staves and lumber, shall be of the growth or produce of the country to which the ship or vessel importing the same shall belong ; and that staves and lumber shall be imported from the country to which the ship or vessel importing the same shall belong : Provided also, that such ships or vessels shall duly enter into, report and deliver their respective cargoes, and re-load at such ports only, where regular custom-houses shall have been established.

But it is his Royal Highness's pleasure, nevertheless, and his Royal Highness, in the name and on the behalf of his Majesty, and by and with the advice aforesaid, is further pleased to order, and it is hereby ordered, that nothing hereinbefore contained shall be construed to permit, after the said first day of December, one thousand eight hundred and eleven, the importation of staves, lumber, horses, mules, asses, neat cattle, sheep, hogs, poultry, live stock, live provisions, or any kind of provisions whatsoever as aforesaid, into any of the said islands, lands, or territories, in which there shall not be at the time when such articles shall be brought for importation, the following duties on such articles, being of the growth or produce of the United States of America ; namely,

	Sterling Money.	Current Money of Jamaica.
* For every quintal of dried or salted cod, or ling fish [* 9] cured or salted	£ s. d.	0 2 6
For every barrel of cured or pickled shads, alewives, mackerel or salmon, a proportionate duty.		
On wheat flour per barrel, not weighing more than one hundred and ninety-six pounds, net weight	0 6 8	
On bread or biscuit of wheat flour, or any other grain per barrel, not weighing more than one hundred pounds, net weight,	0 3 4	
On bread, for every hundred pounds, made from wheat or any other grain whatever, imported in bags or other packages than barrels, weighing as aforesaid	0 3 4	
On flour or meal made from rye, pease, beans, Indian corn, or other grain than wheat, per barrel, not weighing more than one hundred and ninety-six pounds	0 3 4	
On pease, beans, rye, Indian corn, callivances, or other grain, per bushel	0 0 10	
On rice, for every one hundred pounds net weight	0 3 4	
And so in proportion for a less or larger quantity.		
On shingles, called Boston chips, not more than twelve inches in length, per thousand	0 3 4.	
On shingles, being more than twelve inches in length, per thou- sand	0 6 8	
For every twelve hundred (commonly called one thousand) of red oak staves	1 0 0	
For every twelve hundred (commonly called one thousand) of white oak staves, and for every one thousand pieces of heading	0 15 0	
For every one thousand feet of white or yellow pine lumber of all descriptions	0 10 0	
For every thousand feet of pitch pine lumber	0 15 0	
For all other kinds of wood or timber not before enumerated	0 15 0	
For every one thousand wood hoops	0 5 0	
And in proportion for a less or larger quantity of all and every the articles enumerated.		
Horses, neat cattle, or other live stock, for every one hundred pounds of the value thereof, at the port or place of importa- tion	10 0 0	

* And his Royal Highness, in the name and on the behalf of his [* 10]
Majesty, and by and with the advice aforesaid, is further pleased to
order, and it is hereby ordered, that notwithstanding any thing hereinbefore
contained, the said permission and authority to import and export shall cease
and determine, or be varied and altered before the expiration of the above-
mentioned period of the thirty-first day of December one thousand eight hun-
dred and twelve, at the expiration of six months after the notification in the
London Gazette of any order of his Majesty, or of his Royal Highness the

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Prince Regent, in the name and on the behalf of his Majesty, by and with the advice of his Majesty's privy council, for revoking, varying, or altering such permission and authority, or shall cease and determine at the expiration of six months after the ratification of definitive treaty of peace.

CHETWYND.

At the Court at York House, the 6th day of September, 1811; present, his Royal Highness the Prince Regent in Council.

WHEREAS it is expedient further to encourage the trade from Heligoland to and from the ports and places situated between Norden and the river Eyder both inclusive, his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that licenses be granted by the governor or lieutenant-governor of Heligoland, but in his Majesty's name, to such person or persons as the said governor or lieutenant-governor shall think fit, allowing such person or persons to export from Heligoland direct to any port or place from Norden to the Eyder, both inclusive, any articles which shall be certified by the certifying officer at Heligoland to have been legally imported into that island from some port of the United Kingdom (not being naval or military stores) in any vessels bearing any flag, except the French; and also to import into the said island in any such vessels from any ports or places within the limits above described, cargoes of grain, corn, meal, and flour, rice, madder, and madder roots, smalts, argol, galls, cream of tartar, safflower, saffron, verdigrease, olive oil, fruit, ashes, juniper berries, organized thrown and raw silk, (not being the production of the East Indies or China,) [* 11] quicksilver, bullion * coined and uncoined, goat, kid, and lamb skins, rags, oak bark, flax, seeds, oil of turpentine, pitch, hemp, timber, fir, oak, oak plank, masts and spars, butter and cheese, flaxen and linen yarn, drugs and hides, linens, German wool, stag horns, antimony, zaffers, French cambrics and lawns, hams, cantharides, angelica roots, terras, tobacco in legal packages, and no other articles whatever, to whomsoever the said articles may appear to belong, such articles to be specified in the bill of lading of such vessel, subject, however, to such further regulations and restrictions, with respect to all or any of such articles so to be exported or imported, as to the said governor or lieutenant-governor of the island for the time being respectively shall from time to time seem fit and expedient.

And it is further ordered, that the commanders of his Majesty's ships of war and privateers, and all others whom it may concern, shall suffer every such vessel, sailing conformably to the permission given by this order, and having any such license as aforesaid, to pass and repass direct between Heligoland and the ports between Norden and the river Eyder, both inclusive, in such manner

and under such terms, regulations, and restrictions as shall be expressed in the said license.

And it is further ordered, that in case any vessel so sailing as aforesaid, for which any such license as aforesaid shall have been granted, and which shall be proceeding direct upon her said voyage, shall be detained and brought in for legal adjudication, such vessel with her cargo shall be forthwith released by the Court of Admiralty, in which proceedings shall be commenced, upon proof being made that the parties had duly conformed to the terms, regulations, and restrictions of the said license ; the proof of such conformity to be upon the person or persons claiming the benefit of this order or obtaining or using such license, or claiming the benefit thereof.

And the right honorable the lord commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

(Signed)

CHETWYND.

* *At the Court at Whitehall, the 1st October, 1811 ; present, his [* 12] Royal Highness the Prince Regent in Council.*

WHEREAS it is expedient that the trade and commerce to and from the Cape of Good Hope, and the territories and dependencies thereof, which is at present carried on not only by British ships and vessels belonging to the subjects of any country or state in amity with his Majesty, should from the day herein-after mentioned, be carried on in British ships and vessels only, and the permission that has been granted by an order of his Majesty in council of the 12th April, 1809, for foreign ships and vessels to carry on the said trade and commerce, should cease and determine ; his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that every thing in the said order contained, which permits ships and vessels belonging to the subjects of any country or state in amity with his Majesty, to enter into the ports of the said settlement of the Cape of Good Hope, and of the territories and dependencies thereof, and to carry on trade and traffic with the inhabitants of the said settlement and of the territories and dependencies thereof, and to import and export to and from the ports of the said settlement, and of the territories and dependencies thereof, any goods, wares, or merchandise whatsoever, shall be and the same is hereby, from and after the 12th day of April, 1812, revoked and determined.

Provided, however, that nothing in this order contained shall extend or shall be construed to extend to prevent the entry into the ports of the said settlement of the Cape of Good Hope, and of the territories and dependencies thereof, of

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any ships or vessels belonging to the subjects of any country or state in amity with his Majesty, which may resort thither for repairs or refreshment, in which case a part of the cargoes of such ships and vessels may be permitted to be disposed of, for the purpose of defraying the expense of such repairs or refreshment; nor to prevent the entry into the said ports of any vessels belonging to the subjects of any country or state in amity with his Majesty, laden with provisions, and which shall be furnished with a license from the governor of the Cape of Good Hope, permitting such importation, which license he is hereby empowered to grant; and the right honorable the lords commissioners of his Majesty's treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein, as to them may respectively appertain.

CHETWYND.

[* 13] * ORDER. Jan. 6th, 1812, continuing order July 19th, 1811, prohibiting exportation of ships' stores, &c.

ORDER. Jan. 6th, continuing order July 19th, prohibiting the exportation of gunpowder, arms, &c.

FOREIGN OFFICE, 21st January, 1812.

His Royal Highness the Prince Regent, acting in the name and on the behalf of his Majesty, has been pleased to cause it to be signified, by the Marquis Wellesley, his Majesty's principal secretary of state for foreign affairs, to the ministers of friendly powers, residing at this court, that the necessary measures have been taken by the command of his Royal Highness, acting in the name and on the behalf of his Majesty, for the blockade of the islands of Corfu, Fano, and Paxo; and of Perga, on the coast of Albania; and that, from this time, all the measures authorized by the law of nations will be adopted and executed, with respect to all vessels which may attempt to violate the said blockade.

ORDER. Jan 24th, continuing order July 19th, granting permission to import hides, skins, &c., in neutral ships, &c.

*At the Court at Carlton House, the 4th day of March, 1812; present, his
Royal Highness the Prince Regent in Council.

WHEREAS it has been represented to his Royal Highness the Prince Regent, that divers commercial houses in London and other parts of the United Kingdom, connected in trade with Spain, have been accustomed to have partners in their said houses resident in Spain, and that it becomes more necessary in the present state of that country, that such partners should continue to reside there for the protection of the interests of their said houses, and for facilitating the commercial intercourse between the two countries: And whereas it may happen that places wherein such persons may be resident may have fallen, or may fall, under the possession and usurpation of France, and that in consequence thereof doubts may arise upon the national character of the said persons, to the prejudice of them and of their partners and houses of trade in any part of the United Kingdom:

His Royal Highness the Prince Regent, acting in the name and on the behalf of his Majesty, is pleased, by and with the advice of * his [* 14] Majesty's privy council, to declare, and it is hereby declared, that all persons, natives of Spain, being partners in any house of trade in any part of the United Kingdom, and resident in Spain, or in any island in Europe dependent thereon, for the purpose of transacting the business of their respective houses, shall be considered as stranger friends, and shall in no case be treated as alien enemies; and that persons, being British subjects, and resident in Spain, or in any island in Europe dependent thereon, for the purpose of transacting the business of any house of trade in which they are partners in any part of the United Kingdom, shall be considered, and are hereby declared to be so resident as aforesaid under his Majesty's license, and without prejudice to their character of British subjects, or to any of the rights or privileges belonging thereto;

Provided, that the names of all persons claiming the benefit of this order, shall, within six months from the date hereof, or from the time of their going henceforth to reside in Spain, or in any island in Europe dependent thereon, be given in, together with the names of their respective houses of trade in the United Kingdom, and the usual place of their abode in Spain, or in any island as aforesaid dependent thereon, to the clerk of his Majesty's most honorable privy council: And it is further ordered, that this order shall be of no effect for the benefit or protection of any person that shall not duly comply with the said provision.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

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At the Court at Carlton House, the 20th of March, 1812; present, his Royal Highness the Prince Regent in Council.

WHEREAS certain licenses have been granted for the importation of raw or thrown silk from ports of France, restricting the time of such importation to the first day of April next :

[* 15] * And whereas it has been represented, that causes may have arisen which may prevent divers vessels sailing under the protection of the said licenses from arriving in the ports of the United Kingdom, on or before the said first day of April :

His Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that ships and goods sailing under the protection of the said license shall be allowed to pass without molestation on account of the expiration of the times specified in the said licenses ; provided the said vessels shall have cleared out from the ports and places of shipment prior to the first of April aforesaid.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

CHEWYND.

ORDER. March 20th, continuing order, March 28th, 1811, regulating importation of provisions.

At the Court at Carlton House, the 8th day of April, 1812; present, his Royal Highness the Prince Regent in Council.

WHEREAS by an order of his Royal Highness the Prince Regent in council, bearing date the 6th of September last, his Royal Highness was pleased, in the name and on the behalf of his Majesty, to authorize and empower the governor or lieutenant-governor of Heligoland to grant licenses in his Majesty's name, to such persons as the said governor or lieutenant-governor should think fit, allowing such person or persons to export from Heligoland, direct to any port or place from Nordon to the Eyder, both inclusive, any articles which shall be certified by the certifying officer at Heligoland to have been legally imported into that island from some port of the United Kingdom (not being naval or military stores,) and to import into the said island certain articles specified in the said above-recited order.

* And whereas it is expedient that the powers vested in the said [* 16] governor and lieutenant-governor of Heligoland should be extended so far as respects the ports and places to and from which the articles therein specified shall be permitted to be exported or imported ; his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that licenses be granted by the governor or lieutenant-governor of Heligoland, but in his Majesty's name, to such person or persons as the said governor or lieutenant-governor shall think fit, allowing such person or persons to export from Heligoland, direct to any port or place from Norden to Horn Point on the coast of Jutland, both inclusive, and to import from any port or place, situate within the said limits, the several articles specified in the said above-recited order of the Prince Regent in council of 6th September last, in vessels of the description therein stated, subject to the rules, regulations, and restrictions therein contained, and subject to such further regulations and restrictions, with respect to all or any of such articles so to be exported or imported, as the said governor or lieutenant-governor of the island for the time being respectively shall, from time to time, see fit and expedient.

And it is further ordered, that the commanders of his Majesty's ships of war and privateers, and all others whom it may concern, shall suffer every such vessel sailing conformably to the permission given by this order, and having any such license as aforesaid, to pass and repass direct between Heligoland and the ports between Norden and Horn Point, both inclusive, in such manner and under such terms, regulations, and restrictions, as shall be expressed in the said license ; and it is further ordered, that in case any vessel so sailing as aforesaid, for which any such license as aforesaid shall have been granted, and which shall be proceeding direct upon her said voyage, shall be detained and brought in for legal adjudication, such vessel, with her cargo, shall be forthwith released by the Court of Admiralty, in which proceedings shall be commenced, upon proof being made that the parties had duly conformed to the terms, regulations, and restrictions of the said license : the proof of such conformity to be upon the person or persons claiming the benefit of this order, or obtaining or using such license, or claiming the benefit thereof.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, * the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

CHETWYND.

At the Court at Carlton House, the 21st of April, 1812 ; present, his Royal Highness the Prince Regent in Council.

WHEREAS the government of France has, by an official report, communicated by its minister for foreign affairs to the conservative senate, on the 10th

of March last, removed all doubts as to the perseverance of that government in the assertion of principles, and in the maintenance of a system, not more hostile to the maritime rights and commercial interests of the British empire, than inconsistent with the rights and independence of neutral nations, and has thereby plainly developed the inordinate pretensions which that system, as promulgated in the decrees of Berlin and Milan, was from the first designed to enforce :

And whereas his Majesty has invariably professed his readiness to revoke the orders in council adopted thereupon, as soon as the said decrees of the enemy should be formally and unconditionally repealed, and the commerce of neutral nations restored to its accustomed course :

His Royal Highness the Prince Regent (anxious to give the most decisive proof of his Royal Highness's disposition to perform the engagements of his Majesty's government) is pleased, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, to order and declare, and it is hereby ordered and declared, that if, at any time hereafter, the Berlin and Milan decrees shall, by some authentic act of the French government, publicly promulgated, be absolutely and unconditionally repealed, then, and from thenceforth, the order in council of the seventh day of January one thousand eight hundred and seven, and the order in council of the twenty-sixth day of April one thousand eight hundred and nine, shall, without any further order, be, and the same are hereby, declared from thenceforth to be wholly and absolutely revoked : and further, that the full benefit of

[* 18] this order shall be extended to any ship or *cargo captured subsequent to such authentic act of repeal of the French decrees, although antecedent to such repeal such ship or vessel shall have commenced and shall be in the prosecution of a voyage which, under the said orders in council, or one of them, would have subjected her to capture and condemnation ; and the claimant of any ship or cargo which shall be captured or brought to adjudication, on account of any alleged breach of either of the said orders in council, at any time subsequent to such authentic act of repeal by the French government, shall, without any further order or declaration on the part of his Majesty's government on this subject, be at liberty to give in evidence in the High Court of Admiralty, or any Court of Vice-Admiralty before which such ship or cargo shall be brought for adjudication, that such repeal by the French government had been, by such authentic act, promulgated prior to such capture ; and upon proof thereof, the voyage shall be deemed and taken to have been as lawful as if the said orders in council had never been made ; saving nevertheless to the captors such protection and indemnity as they may be equitably entitled to in the judgment of the said court, by reason of their ignorance, or uncertainty as to the repeal of the French decrees, or of the recognition of such repeal by his Majesty's government at the time of such capture.

His Royal Highness, however, deems it proper to declare, that should the repeal of the French decrees, thus anticipated and provided for, prove afterwards to have been illusory on the part of the enemy ; and should the restrictions thereof be still practically enforced, or revived by the enemy ; Great Britain will be compelled, however reluctantly, after reasonable notice, to have

recourse to such measures of retaliation as may then appear to be just and necessary.

And the right honorable the Lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

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* DECLARATION.

[* 19]

The government of France having by an official report, communicated by its minister for foreign affairs to the conservative senate, on the 10th day of March last, removed all doubts as to the perseverance of that government in the assertion of principles, and in the maintenance of a system, not more hostile to the maritime rights and commercial interests of the British empire, than inconsistent with the rights and independence of neutral nations—and having thereby plainly developed the inordinate pretensions which that system, as promulgated in the decrees of Berlin and Milan, was from the first designed to enforce ; his Royal Highness the Prince Regent, acting in the name and on the behalf of his Majesty, deems it proper, upon this formal and authentic republication of the principles of those decrees, thus publicly to declare his Royal Highness's determination still firmly to resist the introduction and establishment of this arbitrary code, which the government of France openly avows its purpose to impose by force upon the world—as the law of nations.

From the time that the progressive injustice and violence of the French government made it impossible for his Majesty any longer to restrain the exercise of the rights of war within their ordinary limits, without submitting to consequences not less ruinous to the commerce of his dominions than derogatory to the rights of his crown, his Majesty has endeavored, by a restricted and moderate use of those rights of retaliation, which the Berlin and Milan decrees necessarily called into action, to reconcile neutral states to those measures, which the conduct of the enemy had rendered unavoidable ; and which his Majesty has at all times professed his readiness to revoke, so soon as the decrees of the enemy, which gave occasion to them, should be formally and unconditionally repealed ; and the commerce of neutral nations be restored to its accustomed course.

At a subsequent period of the war, his Majesty availing himself of the then situation of Europe, without abandoning the principle and object of the orders in council of November, 1807, was induced so to limit their operation, as materially to alleviate the restrictions thereby imposed upon neutral commerce.

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The order in council of April, 1809, was substituted in the room of those of November, 1807, and the retaliatory system of Great Britain acted [^{* 20}] no longer on every country, in which the * aggressive measures of the enemy were in force ; but was confined in its operation to France, and to the countries upon which the French yoke was most strictly imposed ; and which had become virtually a part of the dominions of France.

The United States of America remained nevertheless dissatisfied ; and their dissatisfaction has been greatly increased by an artifice too successfully employed on the part of the enemy, who has pretended, that the decrees of Berlin and Milan were repealed, although the decree effecting such repeal has never been promulgated ; although the notification of such pretended repeal distinctly described it to be dependent on conditions, in which the enemy knew Great Britain could never acquiesce ; and although abundant evidence has since appeared of their subsequent execution.

But the enemy has at length laid aside all dissimulation ; he now publicly and solemnly declares, not only that those decrees still continue in force, but that they shall be rigidly executed, until Great Britain shall comply with additional conditions, equally extravagant ; and he further announces the penalties of those decrees to be in full force against all nations which shall suffer their flag to be, as it is termed in this new code, “ denationalized.”

In addition to the disavowal of the blockade of May, 1806, and of the principles on which that blockade was established, and in addition to the repeal of the British orders in council — he demands an admission of the principles, that the goods of an enemy, carried under a neutral flag, shall be treated as neutral ; — that neutral property, under the flag of an enemy, shall be treated as hostile ; — that arms and warlike stores alone (to the exclusion of ship timber and other articles of naval equipment) shall be regarded as contraband of war ; — and that no ports shall be considered as lawfully blockaded, except such as are invested and besieged, in the presumption of their being taken, [*en prevention d' être pris,*] and into which a merchant ship cannot enter without danger.

By these and other demands, the enemy in fact requires, that Great Britain and all civilized nations, shall renounce, at his arbitrary pleasure, the ordinary and indisputable rights of maritime war ; that Great Britain, in particular, shall forego the advantages of her naval superiority, and allow the commercial property, as well as the produce and manufactures of France, and her confederates, to pass the ocean in security ; whilst the subjects of Great [^{* 21}] Britain are to be, in effect, proscribed from all commercial * intercourse with other nations ; and the produce and manufactures of these realms are to be excluded from every country in the world, to which the arms or the influence of the enemy can extend.

Such are the demands to which the British government is summoned to submit, to the abandonment of its most ancient, essential, and undoubted maritime rights. Such is the code by which France hopes, under the cover of a neutral flag, to render her commerce unassailable by sea ; whilst she proceeds to invade or to incorporate with her own dominions all states that hesitate to sacrifice their national interest at her command ; and in abdication of their just

rights, to adopt a code, by which they are required to exclude, under the mask of municipal regulation, whatever is British from their dominions.

The pretext for these extravagant demands is, that some of these principles were adopted by voluntary compact in the treaty of Utrecht; as if a treaty once existing between two particular countries, founded on special and reciprocal considerations, binding only on the contracting parties, and which, in the last treaty of peace between the same powers, had not been revived, were to be regarded as declaratory of the public law of nations.

It is needless for his Royal Highness to demonstrate the injustice of such pretensions. He might otherwise appeal to the practice of France herself, in this and in former wars; and to her own established codes of maritime law: it is sufficient that these new demands of the enemy form a wide departure from those conditions on which the alleged repeal of the French decrees was accepted by America; and upon which alone, erroneously assuming that repeal to be complete, America has claimed a revocation of the British orders in council.

His Royal Highness, upon a review of all these circumstances, feels persuaded that so soon as this formal declaration, by the government of France, of its unabated adherence to the principles and provisions of the Berlin and Milan decrees, shall be made known in America, the government of the United States, actuated not less by a sense of justice to Great Britain, than by what is due to its own dignity, will be disposed to recall those measures of hostile exclusion, which, under a misconception of the real views and conduct of the French government, America has exclusively applied to the commerce and ships of war of Great Britain.

* To accelerate a result so advantageous to the true interests of both [* 22] countries, and so conducive to the reestablishment of perfect friendship between them; and to give a decisive proof of his Royal Highness's disposition to perform the engagements of his Majesty's government, by revoking the orders in council, whenever the French decrees shall be actually and unconditionally repealed; his Royal Highness the Prince Regent has been this day pleased, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, to order and declare:

" That if, at any time hereafter, the Berlin and Milan decrees shall, by some authentic act of the French government, publicly promulgated, be absolutely and unconditionally repealed, then, and from thenceforth, the order in council of the seventh day of January, one thousand eight hundred and seven, and the order in council of the twenty-sixth day of April, one thousand eight hundred and nine, shall, without any further order, be, and the same are hereby, declared from thenceforth to be wholly and absolutely revoked: and further, that the full benefit of this order shall be extended to any ship or cargo captured subsequent to such authentic act of repeal of the French decrees, although antecedent to such repeal such ship or vessel shall have commenced and shall be in the prosecution of a voyage which, under the said orders in council, or one of them, would have subjected her to capture and condemnation; and the claimant of any ship or cargo which shall be captured or brought to adjudication, on account of any alleged breach of either of the said orders in council,

at any time subsequent to such authentic act of repeal by the French government, shall, without any further order or declaration on the part of his Majesty's government on this subject, be at liberty to give in evidence in the High Court of Admiralty, or any Court of Vice-Admiralty before which such ship or cargo shall be brought for adjudication, that such repeal by the French government had been, by such authentic act, promulgated prior to such capture ; and upon proof thereof, the voyage shall be deemed and taken to have been as lawful as if the said orders in council had never been made ; saving nevertheless to the captors such protection and indemnity as they may be equitably entitled to in the judgment of the said court, by reason of their ignorance, or uncertainty as to the repeal of the French decrees, or of the recognition of such repeal by his

Majesty's government at the time of such capture.

[* 23] * “ His Royal Highness, however, deems it proper to declare, that should the repeal of the French decrees, thus anticipated and provided for, prove afterwards to have been illusory on the part of the enemy ; and should the restrictions thereof be still practically enforced, or revived by the enemy ; Great Britain will be compelled, however reluctantly, after reasonable notice, to have recourse to such measures of retaliation as may then appear to be just and necessary.”

Westminster, April 21, 1812.

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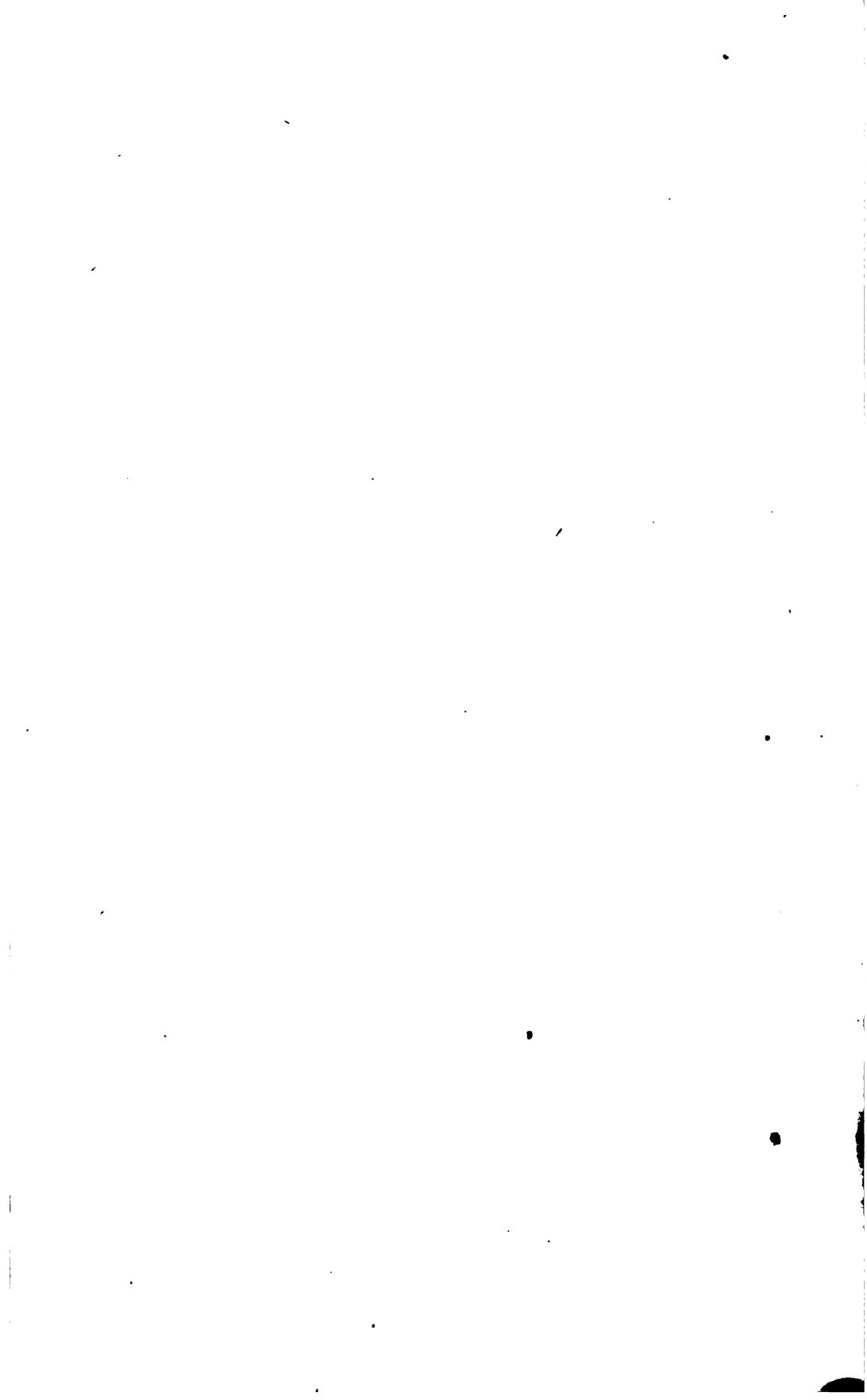
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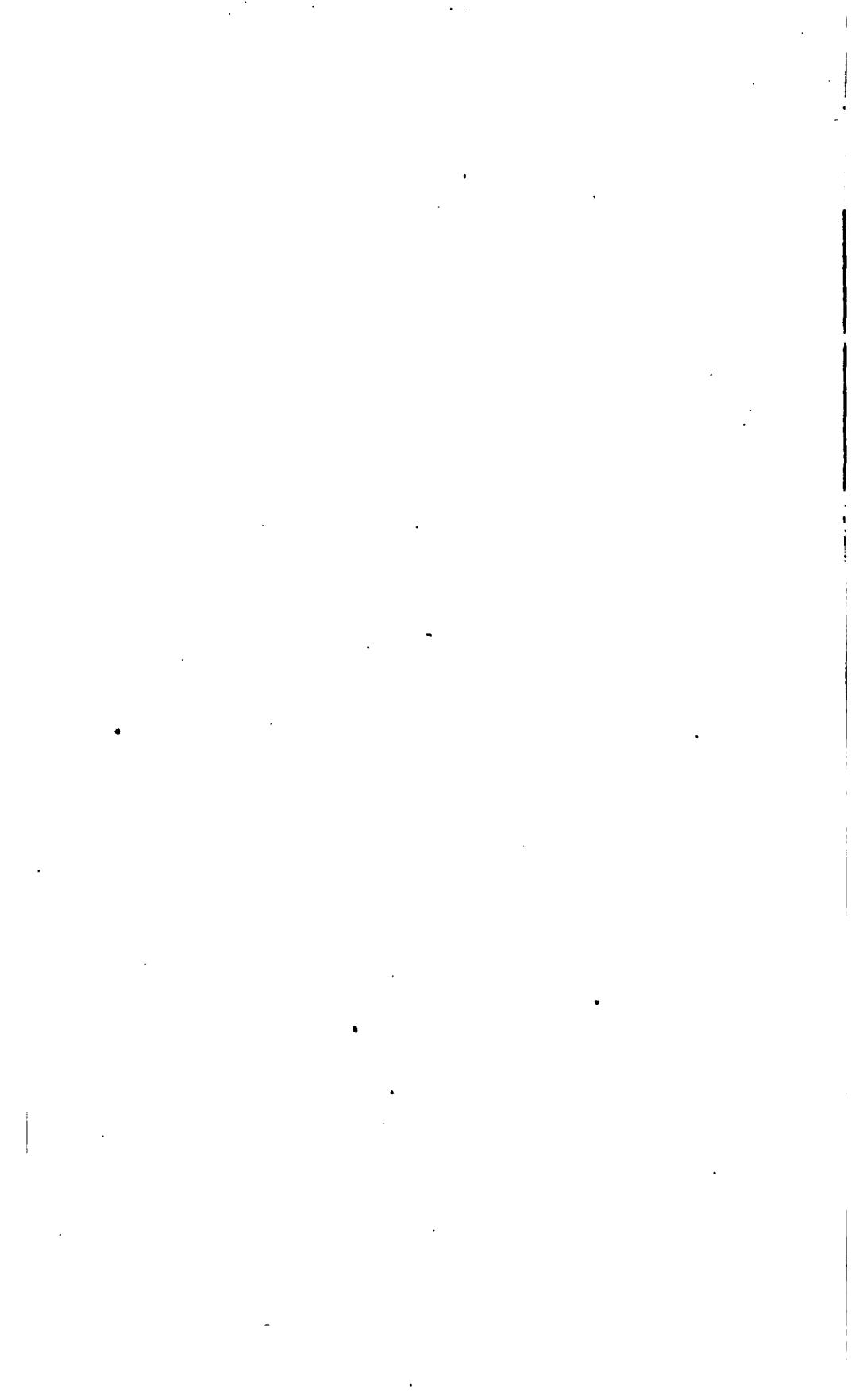
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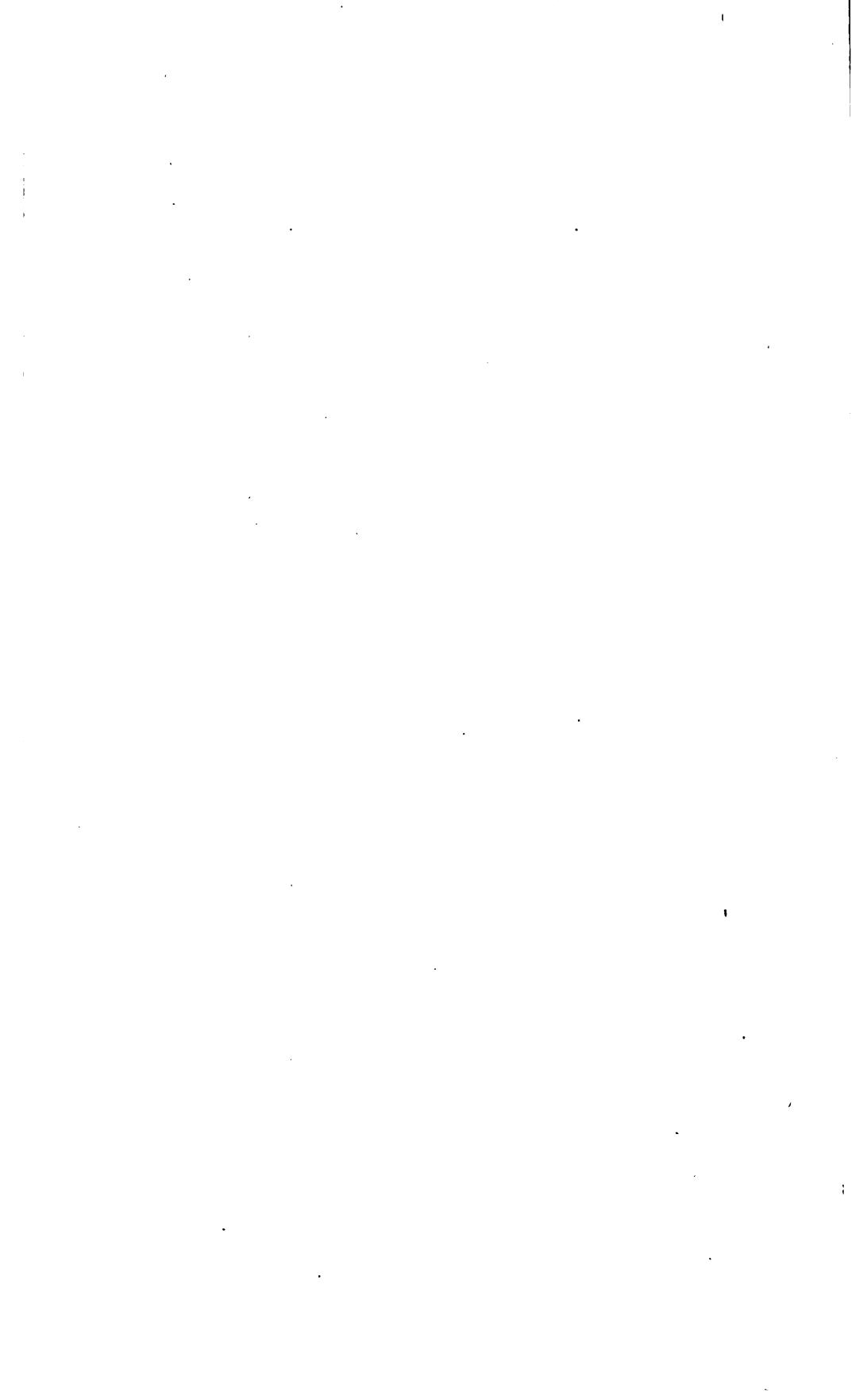
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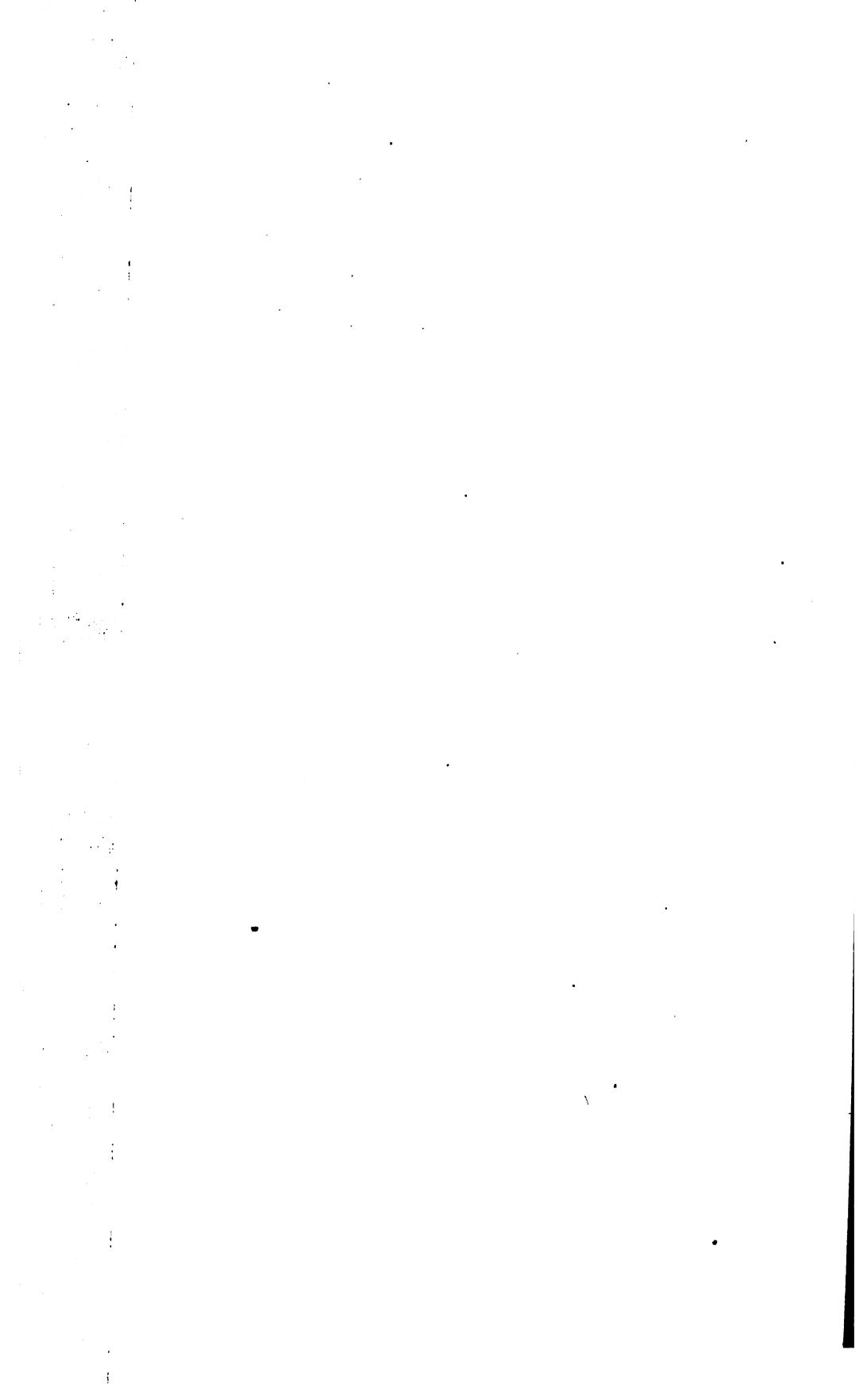
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